
UNIVERSIDADE CATÓLICA PORTUGUESA

# *THE PATH TO CITIZENSHIP: TOWARDS A FUNDAMENTAL RIGHT TO A SPECIFIC CITIZENSHIP*

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# INTRODUCTION

There is a growing tendency towards the devaluation of the concept of citizenship. It was perceived for many years as a key instrument of internal sovereignty. Once States become transparent as a consequence of globalization and global governance, internal instruments of sovereignty become less powerful.

This is particularly evident in the tendency which may be identified in both scholarly works and in State practice towards extending broader legal rights to non-citizens.

Although this may appear to be a means to guarantee political rights and effective participation of migrants in the community, I do not believe it is the best way of integrating migrants in the polity.

Scholars have developed several theories on the changing phenomena of citizenship. Some have declared the devaluation of citizenship, others have recognized the pulverization of its elements and others propose slicing the concept and extending some of its elements to migrants. These theories are generally classified as transnational or global citizenship.

There is room, however, for a different proposal for reassessing citizenship and the interconnection of the concept both with the global arena and internal democratic policies.

In fact, when migrants move to live in another country they become, in the expression of Motomura,

citizens in waiting[1]. This means that to some extent expectations are raised with regard to obtaining the citizenship of the country where they are living and whose economic, social and political growth they contribute to.

It would be a democratic paradox to exclude these people permanently from the citizenship status. Of course we can claim that the concept is irrelevant or we can even slice it, give it away, and then claim the irrelevance of the status. Yet, it will always be a matter of discrimination and ultimately of democratic failings to admit that, according to a certain perception of sovereignty, the member of the "club" – in the words of Walzer – can permanently exclude the others from the exercise of political rights[2].

Seen from this perspective we need to acknowledge the power of citizenship as an instrument of inclusion – and deny the theory of the decline of citizenship – and also acknowledge that diffusing elements of citizenship and granting them to migrants will not achieve the ultimate inclusive target as the status will always be lacking.

If we study naturalization policies around the world, a certain pattern can be found. There are also international legal instruments – such as the European Convention on Nationality – that impose duties on States related to the granting of citizenship and the aforesaid naturalization policies.

It is necessary to reinterpret the right to citizenship set out in the Universal Declaration of Human Rights. For many years it was interpreted as prohibiting

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[1] HIROSHI MOTOMURA, *Americans in Waiting* (2006).

[2] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983).

policies that created or contributed to a situation of Statelessness. For that purpose, international legal instruments were created and judicial decisions were proclaimed. The right to citizenship was perceived as a negative limit to State sovereignty. A State could deny or overrule another State's decision on citizenship if that decision was arbitrary (with no effective link) or contributed to the situation of Statelessness.

It is now necessary to reinterpret that reading of the Declaration. In a globalized world where even citizenship – the last bastion of sovereignty (Legomsky) – has gone global – it is not enough to consider citizenship as a negative limit to State sovereignty[3]. It is probably necessary to consider it as a positive imposition on States. That means that if we consider the right to citizenship as a natural consequence of a path, down the road, that someone initiated the moment they set foot as a migrant in a country, one should probably recognize that the right to citizenship nowadays is no longer the right to have one citizenship but the right to have access to a certain citizenship.

Based on basic principles of transnational citizenship law, such as the principle of protection of legitimate expectations, the principle of proportionality, *ius domicilii* and adverse possessions, as well as the democratic principle and also based on the naturalization pattern around the world, it should be possible to determine that no citizen in waiting should be permanently excluded from citizenship. Although this proposition might sound quite consensual – especially within Western countries with standard naturalization policies – the basic essence of what has been said is very controversial. It not only imposes a

[3] STEPHEN LEGOMSKY, The Last Bastions of State Sovereignty: Immigration and Nationality Go Global (2009), 43-57.

positive duty overriding an important dimension of sovereignty – the symbolic definition of the people – but it also gives rise to a discussion about undocumented migration. The Western pattern on naturalization policies certainly does not include undocumented migrants. However, the same considerations about the democratic principle apply to this category of migrants, most of whom stay for several years in a country with the tolerance of the host State, to say the least. The access of these migrants to citizenship is an active question in the US and is becoming one in Europe as well. There is no legal answer whatsoever, even though it is widely recognized that undocumented migrants have, as would seem obvious, human rights. Does that mean that they also hold the right to citizenship?

I will not try to provide a definitive answer to these questions but, through research and reasoning, I will attempt to understand the state of the art in this field and ultimately identify a trend and predict what the near future of legal scholarship and court decisions in this area will be.

This dissertation does not focus on a particular jurisdiction. Even the focus on the evolution of instruments of international law and on European Citizenship is intended to merely provide examples and contextual explanations of what broader citizenship law is.

Rather, I will follow a transnational law approach. By transnational law I mean the set of rules, principles and arguments that contribute to a certain legal solution regardless of the place or jurisdiction where that solution originates or takes place. The locus of the rule is not important; it is its relevance to the global legal order that matters.

Transnational law has reached all areas of law, including the last bastions of sovereignty such as immigration and citizenship[4].

Global constitutionalism has become an active area of research in transnational law. This means that the general assumptions in law, such as the institutionalization of law making, relations among states and state law nexus, have all been abandoned as sole sources of law. Legal pluralism is making its course[5].

Principles like the ones I use to identify the trend towards a right to citizenship, such as proportionality, expectations and democracy, have all been developed within this transnational framework. Some of them – proportionality and democracy -, as I will later expand on, have even become bold examples of transnationalization of general legal principles[6].

Citizenship has been associated with transnational law for a long time, longer than the recent movement of scholarly discussion on transnational law. As will be discussed in chapter 3, transnational citizenship is a concept rooted in the tradition of citizenship studies.

If there is one characteristic of transnational citizenship it is that it is decentered from the state, outside the traditional institutional locus. That is one of the criticisms usually leveled against the concept.

Interestingly, citizenship, a concept in the realm of sovereignty, was one of the first concepts to be explored from a transnational law standpoint.

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[4] STEPHEN LEGOMSKY, The Last Bastions of State Sovereignty: Immigration and Nationality Go Global (2009), 43-57.

[5] PEER ZUMBANSEN, Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism (2011).

[6] MATTIAS KUMM, Democracy is not enough: Rights, proportionality and the point of judicial review (2009).

Even if we diverge from the common approach of the transnational citizenship theorists, as I will later elaborate, these days it is impossible to conduct thorough research on citizenship from a purely internal standpoint. The same can be said of the classical international law standpoint.

Although I do not focus on any particular jurisdiction, I pay attention to internal rules of citizenship as well as to public international law rules whenever their relevance justifies attention.

The transnational law approach does not ignore these dimensions. However, to identify a transnational trend, a rule that has freed itself from a particular jurisdiction and gained relevance at the transnational level, one must not be attached to a locus or legal system.

This perspective may be regarded as being too broad or vain and one might say that law cannot be constructed on unstable roots. As legal pluralism shows us, it is becoming increasingly difficult to understand law within the classical mind frames. States no longer represent all the richness of law and legal sources. It is necessary to search beyond the States.

As I will also demonstrate, an important part of this movement is explained by the transparency of states that has been brought about by globalization. The era of information and human rights changes a world of states into a world of people.

Individuals do not necessarily relate, in this era, with their neighbor citizens and countrymen but with people, no matter how far away they are, that share the same interests. This has given rise to all sorts of movements. Some of these movements are captured under the idea of transnational citizenship.

So, citizenship is also a key concept to understand the transnationalization of law. Transnational law

cannot be understood without citizenship and citizenship cannot be fully understood without transnational law.

This approach does not ignore the nation-state. Quite to the contrary, unlike theories of citizenship decline, associated with the transnationalization of citizenship, I acknowledge the importance of the status and its inclusive potential. The nation-state is far from being destroyed.

However, there is certainly a different position for the nation-state from Westphalia to the global world. A global world without a global state still needs traditional states to enforce its principles and rules. As I see it, States are obliged by the transnational law to enforce basic principles and rules through their traditional enforcement channels. It is very clear that international and transnational law will not be enforced otherwise.

This does not mean, though, that States remain free to do whatever they wish as long as this does not conflict with other States. Internal constraints increasingly result from international and transnational law, even in areas considered to be the realm of sovereignty, such as citizenship.

This dissertation covers, in chapter one, a conceptual evolution of citizenship, ranging from semantic variations to the evolution from the classic civilizations, the Middle Ages and the French Revolution.

Chapter 2 focuses on the evolution of international law of citizenship and the new international law of citizenship.

In chapter 3 I address the transnational citizenship concept and its variations. I will also criticize the concept in the context of the traditional citizenship status.

Chapter 4 analyses European citizenship as the only institutional example of transnational citizenship. I will dedicate attention especially to the relations between national and European citizenship and will discuss the recent and very relevant court decision by the European courts.

In Chapter 5 I will look into the concept of migrants as citizens in waiting, looking at migrants' rights and their path to citizenship.

The conclusion will be presented in chapter 6 where, by identifying a trend towards a general right to a specific citizenship, I sum up different arguments that can be used in support of that trend.

# I – Conceptual evolution

## §1. Semantic variations

Citizenship has aroused the interest of a number of fields of knowledge and has proved to be a transversal topic. Controversy extends, however, from the very concept of citizenship. Even from a legal perspective, there are those who refer to citizenship as the exercise of rights – here being closer to the sociological idea – and, in this context, citizenship is the active intervention of a citizen within the community of which he is a part[7].

Alternatively, citizenship has been seen as a link which connects an individual to a particular community. This link translates into a strict affinity, based on criteria of connection, which justify that members of the community have access to specific rights, since these are related to the community's method of organization. In this sense citizenship is synonymous with nationality.

Many authors refer to these two concepts indiscriminately[8]. Others attempt to create a distinction between citizenship and nationality, despite being unable to reach a consensus as to this distinction.

On this subject, GERARD-RENÉ DE GROOT[9] has conducted an interesting semantic analysis of several European languages and concluded that in most of these

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[7] MARC HOWARD, Comparative Citizenship: An Agenda for Cross-National Research (2006), 444.

[8] PETER SPIRO, A new international law of citizenship (2011), 717.

[9] GERARD RENÉ DE GROOT, Towards a European Nationality Law (2004), 2.

languages there is a variation which is similar to that which we find between the Portuguese terms "cidadania" and "nacionalidade". Thus, the author states that "In the United Kingdom, the term 'nationality' is used to indicate the formal link between a person and the state. The statute that regulates this status is the *British Nationality Act*. The most privileged status to be acquired under this Act, however, is the status of 'British citizen'. In Ireland, it is the Irish Nationality and Citizenship Act that regulates who precisely possess Irish citizenship. In the United States, the Immigration and Nationality Act regulates who is an American citizen, but the Act also provides that the inhabitants of American Samoa and Swains Island have the status of American nationals without citizenship"[10]. The Author continues his

[10] Title 8, Section 1408 US Code: "Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years -

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years"

semantic analysis by considering the variations in the different translations of the EC Treaty and the Draft Constitution. Here we find the distinction between "citizenship of the Union" and "national citizenship". Yet, the concepts of citizenship and nationality are used indiscriminately: in French *nationalité* and *citoyenneté*, in Dutch *nationaliteit* and *burgerschap*, in German *staatsangehörigkeit* and *bürgerschaft*, in Portuguese *nacionalidade* and *cidadania* and in Spanish *nacionalidad* and *ciudadania*. According to De Groot, "In four other languages of the Union, a single term is used to denote the concepts of 'nationality' and 'citizenship'. The Italian version uses *cittadinanza* for both. The Italian word *nazionalità* could not be used because of its obvious ethnic connotation. The Danish text refers to *statsborger i en medlemsstat* and *unionsborgerskab*, thus referring twice to *borgerskab*. The Danish word *nationalitet* had to be avoided, also because of its 'ethnic' connotation"[11]. Moreover, the Danish statement on Citizenship of the Union, which is annexed to the Treaty of Maastricht which created it, is evocative.[12]

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[11] GERARD RENÉ DE GROOT, Towards a European Nationality Law (2004), 3-4.

[12] According to this declaration:"1. Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation State. The question of Denmark participating in any such development does, therefore, not arise.

2. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States".

The task of defining the concepts of "citizenship" and "nationality", therefore, proves to be rather complex. Work can be carried out in this sense in a given language. However, the conclusions might be disastrous if compared with other languages, in a global context. Indeed, at a time of internationalization of citizenship, it is important to avoid any rumblings that may upset its global terminology. Hence, the authors who have examined this topic, mostly from an international perspective, point out the indiscriminate use in their texts of both concepts.

In this text I have opted to use the concept of citizenship rather than nationality. A reference to nationality will only be found when it relates to a quote from other texts, whether these be legal texts or legal theory texts.

There are three reasons for this option:

a) The ethnic connotation of nationality – although in a fundamentally sociological context – confuses the idea of citizenship as a fundamental right;

b) Recent texts tend to use the term "citizenship", either because it is neutral in character, or because it covers a wider concept which includes derived and transnational citizenships;

c) Transnational and cosmopolitan citizenship is in opposition to the idea of nationality, which is synonymous with belonging to a closed ethnic group.

## §2. Citizens, members and foreigners

The current meaning of citizenship depends on how it is framed within the structure of the State, if we accept the idea of a people as a linking element or substratum of legitimacy of a political community.

As historical analysis demonstrates, lying at the origin of citizenship is, precisely, the constitutional concept of a people. This origin of the concept is of great importance if we are to fully understand its current configuration. It is not possible to conceive citizenship disconnected from its substratum and the constitutional notion of a people. In fact, the definition of citizenship is the sovereign instrument for the definition of a people; in ancient times, as will be seen, the interpretation was always thus.

On this subject Joseph Weiler points out that being the beneficiary of rights created for others does not make a foreigner a citizen, and therefore citizenship is an important source of legitimizing legal rules. Basically, the legitimization of those rules is based on the *demos* that the foreigner wishes to belong to[13]. Thus, considering the people – within the framework of a democratic system – as the basis of the validity of legal rules, the validity of those rules depends on the concept of a people itself[14]. Distortion of its configuration will

[13] JOSEPH H. H. WEILER, European Citizenship (1998), 451.

[14] JÜRGEN HABERMAS, The European Nation State – Its Achievements and Its Limitations – On the Past and Future of Sovereignty and Citizenship (1997), 112.

lead to democratic dispersal and, therefore, to the disappearance of the substratum of its validity[15].

This idea is based on the blurring of the *ius sanguinis*, one of the criteria, alongside *ius soli*, for attributing original citizenship, due to the transnational movement of persons. On this topic, we may consider this expressive passage by André García Inda: "the case of immigrants is paradigmatic. Indeed, the generations of immigrants represent a paradigm that some have called "new cosmopolitans": the landless of post-modernity, who call into question the legitimizing value of the traditional identities, related with the land (*ius soli*) and kinship ties (*ius sanguinis*), and also expose the excluding nature of a concept of fundamental rights built upon a limited idea of political community, of a morally relevant "us", which is the result of inherited national borders. In relation to them one may truly say, in the full sense, what the *Letter to Diognetus* (an anonymous brief from the 2nd century, attributed to the tradition of St. Paul) said regarding the universalist intention of the Christians: "They live in their own countries as though they were only passing through. They play their full role as citizens, but labor under all the disabilities of aliens. Any country can be their

[15] On the variations of political-constitutional and ideological conceptions of a people, see JORGE MIRANDA, *Manual de Direito Constitucional* (2010), 80; LUZIA MARQUES DA SILVA CABRAL PINTO, *Os Limites do Poder Constituinte e a Legitimidade Material da Constituição* (1994), 185; MARIANO FERNANDEZ ENGUITA, Las dos Variantes del Cierre: Demos y Etnos (2003), 53; MIKEL AZURMENDI INCHAUSTI, Migraciones y Cultura Democrática (2003), 64; RICARDO ZAPATA-BARRERO, Inmigración y Multiculturalidad: Hacia un Nuevo Concepto de Ciudadania, (2003), 117.

homeland, but for them their homeland, wherever it may be, is a foreign country""[16].

Michael Walzer recognizes the right of each community to outline its own resident population. However, he raises the following issue with regard to foreigners: "these people may be members in their turn of minority or pariah groups, or they may be refugees or immigrants newly arrived. Let us assume that they are rightfully where they are. Can they claim citizenship and political rights within the community where they now live?" [17].

This is the central question which I will seek to answer throughout this work. In what circumstances can a foreigner claim citizenship of a given State and, on the flip side, what conditions must be fulfilled for a State to be obliged to grant citizenship?

According to the aforementioned author, "The members must be prepared to accept, as their own equals in a world of shared obligations, the men and women they admit"[18].

The phenomenon of immigration has aroused much interest in developed countries. Europe, which is composed of countries with no tradition of immigration but with an increasingly aging population, and feeling the subsequent weight of this aging on the social state, looked to the phenomenon as the panacea for all ills. Here was the means to provide an immediate boost to the labor market, without training costs, with those

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[16] ANDRÉ GARCÍA INDA, El Cosmopolitismo y las Nuevas Fronteras de la Ciudadania (2003), 94.

[17] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 52.

[18] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 52.

who, apart from anything else, would not be able to benefit from the social protection systems of the territory nor would grow old there. This was the figure of the temporary worker applied in the State dimension.

This kind of solution, in my opinion, is not legally sustainable. The first reason for this is that, as will be shown below, states are not able to prevent immigrants from gaining access to social rights. Secondly, the invitation to immigrants cannot be detached from the granting of citizenship. It is not, therefore, unreasonable to consider legitimate the desire to obtain citizenship of a given State. To fully experience the community reality total integration is required. This is provided, as we may see, for the most part by the acquisition of citizenship of the State. Somebody who lives and works in a given State, contributes to its growth, is subject to its rules and, in a word, is a prisoner of its fate and the success of its public policies, inevitably wishes to participate in the community life. Or he at least would like to feel that this possibility is not denied him, and that he is recognized as a full member of the community.

Otherwise, with the pretext of preserving a model of life or social model, we will be perpetuating a situation which proves to be democratically paradoxical and morally deviant. Immigrants who are denied citizenship would, in the words of Walzer, be comparable to slaves, which would transform our society into a "little tyranny"[19]. The evolution of history shows us, on the contrary, the evolution of citizenship as an instrument of inclusion.

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[19] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 52.

## §3. Citizenship and inclusion in Ancient Greece and Rome

### 1. Citizenship in Ancient Greece

#### a) Introductory note

The Greek civilization, the precursor to citizenship as political participation, gave great importance to the ties between citizens and the *polis*. Indeed, "in the Greek world the individual was always subjected to the common interest. The community system ensured the unity of the political organization and the harmonious combination of interests of a superior order based on virtue"[20]. Thus, the civilization which created democracy based the substratum of legitimization of popular participation on the *demos*.

In the Greek *polis*, citizenship arose as a privileged status for few in relation to many non-citizens, regarding economic conditions and political power. It represented not only the status of being a member of the community but, above all, the degree of participation of each member in governing the city.

In order to understand the concept of citizenship in Ancient Greece, it therefore seems imperative to provide a brief outline of the framework and social organization.

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[20] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 31-32.

### b) Citizenship in the social organization of Athens

The evolution of citizenship has demonstrated the capacity for a status, albeit heavily influenced by ancient times, to change into something innovative, from a set of dependencies into a true political community. We can identify "different stages of the development of citizenship in ancient Athens from Solon [about 630-560 b.C.] through Cleisthenes [about 570-508 b.C.] and Pericles [495-429] until Aristotle's lifetime (384-322). In this evolution citizenship had always been accompanied by significant social transformations or by the needs of war. Each time the definitions of who qualified for the status of citizenship were modified, and this means that each time the community was reshaped in terms of who had which rights, duties, responsibilities and access to both material and immaterial benefits"[21].

Before the reforms of Cleisthenes, the citizens of Attica were divided into four tribes (*phylai*), each of which was composed of various brotherhoods (*phratriai*) which were in turn made up of clans (*gene*) and cult communities (*thiasoi*)[22]. The citizens belonged not only to their family but also to a cult community via their brotherhood and, in a wider context, to the political community considered as a whole.

The kinship relationships were particularly decisive since they determined the ties and traditional rules that would give the individual, on reaching adulthood, command of the *oikos*, the management of which was essential to his projection into the public sphere and,

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[21] ULRICH PREUSS, The ambiguous meaning of citizenship (2003), 4.

[22] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 57.

consequently, his full elevation to the category of citizen.

On the other hand, the Greek city sought to maintain a strict separation between the public – *polis* – and the private – *oikos*. In order to be considered a citizen, a man had to be the patriarch of a private house where he was served by slaves and his own wife. This condition of head of the *oikos* gave him the necessary projection to the *polis*. Basically, it was a question of demonstrating his capacity to self-govern his home as a form of guaranteeing his capacity for public government. Those who ran their own *oikos* gained dimension within the *polis*. The two spheres were, nevertheless, totally separate, and it was unthinkable for citizens to discuss their private life in public[23].

Another characteristic of the citizen, besides self-government – or government of the *oikos* – was self-control. As long as citizens were able to control themselves, they would be capable of governing others – their wives, children and foreigners. On the other hand, a lack of self-control might mean deviation from behavior that was socially acceptable, which would, certainly, be punished as a community crime[24]. Only citizens who proved they were capable of governing their house and controlling themselves were deemed virtuous and, consequently, worthy of citizenship. This was, basically, the example of private virtue as a means of proving public virtue.

What defines a citizen in the Greek city is his capacity to order and obey in a political community built among equals. In order for this to happen, the citizen had to correspond to the top of the command

[23] J. G. A. POCOCK, The ideal of citizenship since classical times (1998), 33-34.

[24] PAUL CARTLEDGE, Greek political thought (2000), 18.

hierarchy, above slaves and women. Thus, the community of citizens resulted in the community of decision-makers in which all, simultaneously, decided and obeyed the respective decisions in a process similar to that which is today called the legislative process[25]. Indeed, "throughout the history of ancient Greek citizenship the citizens were always a minority. On no account did they rule only themselves. They ruled over the great bulk of non-citizens: slaves, women, children, metics, aliens and other categories of individuals who lived within the physical boundaries of Attica"[26].

Hence, it is not possible to properly understand the Greek concept of citizenship without noting that it only led to the freedom of some persons via elevation to political participation, which should prevail over the private sphere, the family and economic life. Thus, the concept of citizenship for the Greeks contained the seeds of freedom, although it was still limited according to the condition of each person. This distinction presented a challenge, from the outset, to the concept, which would have to deal with different categories of members and various levels of legal protection.

Class was relevant, namely for the purposes of applying the criminal law. Thus, for example, the murder of a Greek citizen or his family was tried in a higher court and could lead to the application of the death penalty. However, the murder of a metic or a slave was tried in a lower court and could only result in exile[27].

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[25] J. G. A. POCOCK, The ideal of citizenship since classical times (1998), 33.

[26] ULRICH PREUSS, The ambiguous meaning of citizenship (2003), 3.

[27] PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 12.

Citizenship constituted an end in itself insofar as it represented freedom. Being a citizen meant being free to participate in public life. In this sense, citizenship was not only a means of achieving freedom, it was freedom in itself[28].

For this reason, slaves could never acquire the status of citizen, being condemned to serve and categorized as utility goods, as objects rather than the subjects of property. A slave could hardly consider himself a citizen, given that he had no decision-making capacity[29]. His participation in politics was "unthinkable, given that his natural condition of inferiority was an insurmountable obstacle", since he was considered to an object of ownership[30]. Slaves were regarded as utility goods, and not as holders of virtue. These characteristics would not be compatible with the citizen which, by definition, should demonstrate a high level of virtue.

In the same way, women were tied to the *oikos*, in charge of managing the house, goods and slaves, and unable to rise above the private sphere or to transcend the private dimension which would allow them to ascend to the public cause[31]. Women did not fit within the concept of citizen inasmuch as they did not have the necessary authority for the construction of a community as a result of their dependence on the family.

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[28] J. G. A. POCOCK, The ideal of citizenship since classical times (1998), 34; ARISTOTLE, *The Politics* (1992), 182; KURT RAAFLAUB, *The discovery of freedom in ancient Greece* (2004), 14.

[29] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 34.

[30] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 34.

[31] J. G. A. POCOCK, The ideal of citizenship since classical times (1998), 34.

Thus, the category of citizens was restricted and only included free adult men who were descendents of citizens. Their wives "and other female relatives were, at best, second-class citizens. (…) The unfree were by definition deprived of all political and almost all social honor"[32]. Moreover, Solon's reforms followed this direction. Personal freedom was considered an inalienable right of the citizen[33].

For this reason, Aristotle believed that citizenship was a question of status and not one of wealth or power[34]. Traditionally everything had been simple: "those who disposed of the resources necessary for survival – land, slaves, military power, spiritual charisma which gave them access to the Gods – were those who ruled over the others"[35]. The great innovation in Athens, the birthplace of democracy, was, precisely, the method of participation in public life and its subjective substratum. Indeed, for Aristotle, what distinguishes the *polis* from other human communities is the common concern of the citizens for justice and the common good, in addition to the virtue of others[36].

The connection between virtue and freedom is fundamental to the Athenian notion of citizenship. Those who were not free could not be a citizen insofar as they were overshadowed in their capacity to intervene. It was not enough to be rich, since this did

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[32] PAUL CARTLEDGE, Greek political thought (2000), 17.

[33] KURT RAAFLAUB, Poets, lawgivers and the beginnings of political reflection in Archaic (2000), 41.

[34] According to ARISTOTLE "mankind do not acquire or preserve virtue by the help of external goods"; *The Politics* (1992), 392.

[35] ULRICH PREUSS, The ambiguous meaning of citizenship (2003), 2.

[36] ARISTOTLE, *The Politics* (1992), 175.; JEAN ROBERTS, Justice and the polis (2000), 354; GEORGES LESCUYER, *Histoire des idées politiques* (2001), 94; PIETRO COSTA, *Cittadinanza* (2005), 9.

not necessarily signify freedom. For this reason, it was so important to introduce payment for participation in public activities. This not only allowed the participation of those who did not have funds, but also paved the way to a wider definition of freedom of citizens, who thus ceased to be tied to limitations of a financial nature[37].

Citizenship was the unifying factor in society, and, in order for it to play this role, it was essential that the circumstances on which it was based be restricted. Those considered an *aphretor*, since they did not belong to a *phratria*, were segregated, and not afforded any rights. For the Greek civilization, statelessness was a phenomenon to be combated, even in a radical manner, and citizenship was essentially recognized as a concept of belonging and integration. The citizen can improve himself by participation as long as he has a relationship of belonging. In short, only those who belong can participate. The stateless have no rights.

In ancient times, belonging to a *phratria* was a true rite of passage which provided access to citizenship. As Christian Meier writes, on this topic, "*When a man married, his bride was introduced to the other members of the phratria at a special sacrificial feast. When a son was born he was ceremonially presented to them, to be accepted into their circle (...). Admission to the phratria entailed admission to Attic citizenship (in its early form): only a member of a phratria could be a citizen of Attica. The patria was thus the sphere in which the citizens met in a public capacity and, at the same time, the authority that legitimated the most important events in their private lives*"[38].

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[37] CYNTHIA PATTERSON, *Pericles' Citizenship Law of 451-50 b.C* (1981), 83.

[38] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 57.

The political community showed itself to be united – as a community of equals – around replacing the oligarchy with democracy, the force of which – based on the *demos* – depended on the "intensity of the bonds of reciprocity, trust and readiness to assume duties for the community"[39]. According to Christian Meier, "This close identification of the *polis* with its citizens presupposed a high degree of solidarity, and this could take root only in a general civic interest that transcended all particularist interests. This general interest became so powerful that, on this new plane of citizenship, the citizens determined the conduct of politics just as much as politics determined the conduct of the citizens[40]".

Indeed, as Shaffir notes, "*in the context of the Greek city-state, the polis, citizenship appeared as a double process of emancipation. First it was the liberation of a portion of humanity from tribal loyalties and its fusion into a voluntary civic community. Citizenship is the legal foundation and social glue of the new communality*"[41].

Citizenship was, therefore, an important factor for inclusion, although it might not have been easy to obtain. For some, obtaining citizenship actually proved impossible, due to their condition. However, those who did have it began to consider themselves as members of the most united human community known at that time. It was a source of pride, recognition and union. In short, it represented the full inclusion of those who acquired the status. Of course, what was at the heart of

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[39] ULRICH PREUSS, The ambiguous meaning of citizenship (2003), 4.

[40] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 21.

[41] GERSHON SHAFIR, Introduction (1998), 3.

the union was collective participation, on behalf of the community[42].

In this sense citizens were all those who could participate actively in the collective life and in the construction of the community. The condition of citizen was therefore defined in relation to the possibility of participating. Citizens were all those who proved capable of participating.

### c) Citizenship as political participation

Participation in the political life of the Greek city constituted the improvement of the individual. The great virtue required of citizens was justified by their responsibility to manage the public good[43].

Thus, in this context, citizenship bore some similarity to the rights of citizenship in today's societies, above all in relation to the respective set of political rights. There are, however, some marked differences with regard to citizenship in modern societies. Firstly, although citizens enjoyed what are now called political rights, such as the right to vote, they could not enjoy fundamental freedoms, such as the right to free speech or religious freedom.

The idea of community on which Athenian citizenship was based justified the important limitations to rights to which I have referred. The aim of the *polis* was the happiness of its citizens. This happiness could only truly be achieved in the collective sense, given that the individual concept of happiness was unknown. In this way, each citizen had a genuine interest in the

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[42] PIETRO COSTA, *Cittadinanza* (2005), 11.

[43] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 35.

virtue of the others since only collective virtue would allow happiness to be achieved.

For Aristotle, human virtue lies in all the small actions of Man, each of which may or may not be performed in a virtuous manner. A community based on virtue cannot fail to be fair, since all will ensure compliance with the law and, ultimately, the virtue of each of them[44].

Participation was, therefore, dependent on the virtue exhibited by citizens. The citizen would be fair if he was subjected to law and equality. The law would, therefore, be a source of justice and virtue, since the law requires virtuous action and prohibits vicious action[45]. This action of the law was seeking the happiness of the political community. This form of justice represented complete virtue in citizens' relations with each other. The alliance between justice and virtue seeks altruism insofar as it is exercised in relations with the other[46]. Here the law was understood in a community sense. The rule of law as it is conceived nowadays was not at issue, and neither was its universal application, in the liberal formulation. Law was to be understood as the general will, so virtuous citizens were all those who presented themselves simultaneously as creator and recipient of the law in that which would today correspond to the notion of political community. These concepts are fundamental to an understanding of the modern concept of a people, since they were at the heart of the constitution of the *demos* in Ancient Greece.

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[44] ARISTOTLE, *The Politics* (1992), 392; JEAN ROBERTS, Justice and the *polis* (2000), 355.

[45] JEAN ROBERTS, Justice and the *polis* (2000), 350.

[46] JEAN ROBERTS, Justice and the *polis* (2000), 350.

This idea is, naturally, highly communitarian. It is based on the common good as a paradigm of collective happiness, with no knowledge of forms of individual happiness – or virtue. It is an idea which appears very distant from the current forms of individualism, both its degenerate forms and its highly correct personalist form. In any event, individual rights – arising out of the dignity of the human person – were put to one side in favor of collective virtue.

This collective action naturally had consequences regarding the responsibility of the citizens. Thus, the communities sought to control the actions of the nobles since the city would be responsible for the actions of its citizens. This process of forming collective guilt was typical of a society structured according to community participation. The bad conduct of individuals brought guilt on the whole city, within the logic of the city being represented by its citizens[47].

The collective responsibility was based on the solidarity required among all the citizens in the decisions. Indeed, in a society of participation, or participative citizenship, all can – and should – be considered as joint decision-makers.

The mechanism of individual denial of responsibility was not therefore admissible. Athenian democracy was based on the distinction between the individual who assumed the government of the city and the other members of the community[48]. Precisely because of this, passive political rights were reserved for the most virtuous citizens.

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[47] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 48; ARISTOTLE, *The Politics* (1992), 179.

[48] ARISTOTLE, *The Politics* (1992), 180; GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 40.

Indeed, Athenian democracy was "based on the legitimization of civic virtue and on the sense of community of the individuals called to be part of the political collective, subordinating the exercise of public functions to the recognition of a condition with high moral content"[49].

For this reason specifically, unlike that which had occurred in previous centuries, governing did not imply coercion. Citizenship established a close relationship between those who had the capacity to lead and those who obeyed. This was because citizenship, as it was conceived in Ancient Greece and after the decisive reforms made by Solon and Cleisthenes, led to the progressive politicization of larger sectors of society. The citizens increasingly recognized themselves as such and were aware of public interests and motivated towards sharing a sense of community and solidarity. It was this solidarity in decision-making which led to the collective responsibility.

### d) The awarding of Athenian citizenship: the reforms of Solon, Cleisthenes and Pericles

The legal status of citizenship was virtually non-existent until the reforms made by Solon. In the *polis* there were several types of subdivisions which covered all the citizens. The other free inhabitants – who were not slaves – did not enjoy citizenship, although they were entitled to a protective regime, albeit temporary. In most cases, the groups and communities were based on family connections or geographical contiguity[50]. The

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[49] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 42-43.

[50] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 56.

definition was, therefore, strictly based on criteria of *ius sanguinis* insofar as this geographic contiguity only served to define that which we might today call territory. In these terms, geography only served as a distinguishing criterion between communities in order to know, by it, where one began and the other ended.

Solon was responsible for institutionalizing citizenship. From the time of his Constitution the legal status of the citizen became clear as did the rules applicable to the granting of such status.

The right to citizenship was awarded to banished foreigners who were exercising a profession in Athens. This rule did not last long, however, and in the fifth century b.C. the granting of individual citizenship was very rare[51]. Collective granting of citizenship was common, and depended on important services performed for the city by a group. These services could take the form of military services, or even financial services. The procedure for naturalization was quite simple, only requiring a decree to be issued by the *Pnyx*. However, in the fourth century b.C. additional obstacles were introduced, with a new requirement that a full session of Parliament confirm the procedure with 6000 votes in favor. The new citizens had all the same rights as the old citizens, barring two: they could not become part of the priesthood or become *arcontes*. Each naturalized person could choose the *phratria* that he wished to join.

In order to be considered a citizen, with full rights, two conditions had to be met: it was necessary to be born, within wedlock, to two citizens – here citizenship was considered in the fullest sense, taking into account the restrictions on the rights applicable to women – and to be over 18 years of age.

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[51] JACQUES ELLUL, *Histoire des institutions* (1972), 90.

On the other hand, in Solon's Constitution citizens were divided into strata based on census[52]. Solon thought it necessary to extend the circle of citizens who benefited from political rights. This objective was achieved via a division in terms of census and by the creation of an annually elected council. In this sense, he appealed to the civic responsibility of the citizens who should actively intervene by participating in the existing institutions[53]. Solon's reforms, which sought to strengthen political cohesion in Athens, consisted of the introduction of classes according to ownership which established the level of political participation of the citizens, as opposed to the rule of "birth" which had served as the criterion for political participation up until that time. In short, Solon sought to strike a difficult balance between recognition of power and responsibility to the *demos* and the inevitable role of the aristocracy[54].

Following the Constitution, intermediate levels of participation were artificially created. This development was justified by the need for collective participation and also the needs of individual groups. It is not clear why communities which were already small in size were further subdivided into even smaller groups[55].

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[52] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 37. The census class was assessed according to the citizens' financial means. Classification was based on a declaration by the citizens, which was sometimes incorrect, which led to the disappearance of some classes; JACQUES ELLUL, *Histoire des institutions* (1972), 91.

[53] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 47.

[54] KURT RAAFLAUB, Poets, lawgivers and the beginnings of political reflection in Archaic Greece (2000), 42; ANTÓNIO MARQUES BESSA and JAIME NOGUEIRA PINTO, *Introdução à Política* (1999), 27.

[55] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 57.

This division allowed individuals to be identified for military purposes and in order to better define rights and duties in the context of the community and, above all, it meant individuals had a sense of belonging which it would have been difficult to achieve by other forms of association.

The exclusive nature of governing duties afforded to the citizens should not, however, be confused with an oligarchy. The few that governed did not do so for their own benefit, but for the good of the city. What transformed Attica into a community of citizens was Solon's capacity, by means of his reforms, to find the connecting link between people forming a community which was subject to the law. The community of citizens gave substance to the *polis* and governed for the benefit of the city[56]. This growing public participation became evident from the time of the many reforms of the sixth century b.C., namely the creation of annually elected councils and the courts and the appointment of judges.

The importance of Solon's reforms lies in the creation of a legal status of citizenship. With his political vision, he realized that this status had enormous potential and could play an important role in uniting the society at that time. In this way, by setting out the rules for awarding citizenship, Solon sought to democratize the citizens and place them in the service of the community. From then on citizenship would become an instrument of inclusion in such turbulent times as those later experienced during the Peloponnesian war.

At the end of the sixth century, Cleisthenes provided a boost to this movement by institutionalizing

[56] ULRICH PREUSS, The ambiguous meaning of citizenship (2003), 3.

the civic presence via a deep reform in the political substratum of the *polis*[57].

Cleisthenes did not wish to destroy the former structure. He did, however, seek to reconstitute the tribes and give them new functions. The new order was based on the *demes*, small local settlements, each of which was made up of a town or small city. Some towns with few inhabitants were joined with others in order to form a *deme*. Athens was made up of several *demes*[58].

The local assemblies were responsible for various tasks, including the organization of a list of all the citizens. To be a citizen it was necessary to be over 19 years of age and to be admitted by the *demota*. A citizen had to be of Greek descent and be a man who was capable of participating in public life.

Much has been discussed about what Cleisthenes intended when implementing his reforms. It is thought that there was a concern to generally improve the living conditions of the population by better organizing the territorial districts and reducing dependency on the nobility, thereby contributing to the democratization of Attica.

In any event, it is undeniable that one immediate effect, although it was not Cleisthenes' central concern, certainly carried some weight in his decision: many immigrants from the Greek world were living in Athens at the time; the possibility afforded to them of acquiring Athenian citizenship increased Cleisthenes' support in the assembly[59].

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[57] CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 47.

[58] PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 21; CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 59.

[59] CHRISTIAN MEIER however, points out that this would not have been the true reason for the reform; *The Greek Discovery of Politics* (1990), 59.

The impact of these reforms is not totally known, although it is thought that they gave a great boost to Athenian democracy, both through the more generalized access to citizenship and, above all, as a result of the belief that participation could take place in conditions of equality. The positions of the nobility were gradually losing strength and the citizens were becoming more aware of their position among equals. In any event, Cleisthenes' reforms allowed for a new perception of the citizen. To be a citizen was "now understood in a new sense deriving from the *polis*, while at the same time the *polis* began to be constituted by the citizens"[60]. The traditional standard was based on personal relationships and friendship and never on an institutionalized relationship of citizenship. The *demos* was finally able to overcome the strained relations between the people and the nobility.

The most visible face of these reforms was the confirmation of citizenship as an institutionalized status, an instrument of public policies used as an element of inclusion for the foreigner. Proof of this was the practice of awarding citizenship using mechanisms of law. Throughout the first quarter of the fifth century b.C., the process of granting citizenship became clear and institutionalized. It was transformed into a proper procedure made up of organized acts[61].

During the Peloponnesian war, citizenship performed a central role, yet – due to its over-exposure – it entered a period of crisis. By the end of the war,

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[60] PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 20; CHRISTIAN MEIER, *The Greek Discovery of Politics* (1990), 79.

[61] PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 209.

many Athenians were not asking what they could do for the *polis*, but rather what the *polis* could do for them[62].

Pericles, therefore, sought to restore credibility to the status via important reforms, the greatest that had been made since the time of Cleisthenes. He passed a law making citizenship dependent on the origins of both parents[63]. Thus, for the first time, it was stipulated that citizens should be born of an Athenian father and an Athenian mother, mixed marriages having been prohibited[64].

Pericles was aware of the complexity of the status of citizenship and of the delicate nature of the changes he had produced. He knew that citizenship was a double-edged instrument: it could both reward and exclude. The reward side was associated with the public honors that the city granted to its heroes and, also, the promise of help to those who had heroically defended the public good and to their families[65]. Exclusion represented a lack of morals of all those who could not aspire to acquire such a status.

Pericles' discourse on citizenship positioned the status at the moral and dogmatic level, rather than at the purely legal level which had been the case with Solon and Cleisthenes.

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[62] PIETER RIESENBERG, *Citizenship in the Western tradition: Plato to Rousseau* (1992), 23.

[63] KURT RAAFLAUB, *The discovery of freedom in ancient Greece* (2004), 246; PIETER RIESENBERG, *Citizenship in the Western tradition: Plato to Rousseau* (1992), 23; CYNTHIA PATTERSON, *Pericles' Citizenship Law of 451-50 b.C.* (1981), 8.

[64] PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 215-216.

[65] PIETER RIESENBERG, *Citizenship in the Western tradition: Plato to Rousseau* (1992), 24.

It is important to first understand the historical background to Pericles' reforms. Having dealt with the Peloponnesian war, he had to resurrect Athens from a particularly disturbing period of heavy internal divisions. As stated above, citizenship had lost its credibility. This was partly due to the effects of the war, but also had to do with the fact that it had become generalized as a result of the previous reforms. Afterwards, we must not forget that the fifth century b.C.– Pericles' century – was simultaneously the golden century and the start of Athens' decline[66].

It was therefore clear that these reforms sought to restore to citizenship the prestige it had once known. This would be achieved by providing the status with the exclusivity of being a desired thing. On the other hand, in terms of demographics, Athens was now unrecognizable, so it became necessary to rethink its population structure. It was based on these assumptions that Pericles decided to make the structural changes that he implemented with regard to citizenship.

### e) The foreigner and the various levels of citizenship

In Ancient Greece foreigners were eyed with suspicion and hostility. All those who were strangers to the community were viewed with distrust and had to prove their behavior. Even so, although foreigners were not entitled to obtain citizenship, the Athenian city drew a distinction between "metics" and "barbarians".

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[66] DIOGO FREITAS DO AMARAL, *História das Ideias Políticas* (2001), 60; ANTÓNIO MARQUES BESSA and JAIME NOGUEIRA PINTO, *Introdução à Política* (1999), 28.

Metics were foreigners to the city of Athens, although they belonged to the Greek civilization. Barbarians, on the other hand, were foreigners who spoke a tongue which the Greeks could not understand. They were therefore referred to as "people who uttered sounds like "bar bar" rather than speaking Greek. If they did not speak Greek, they were barbarians"[67]. Indeed, "if we translate both *barbaros* and *xenos* into modern language as "foreigner", we are, for the sake of ease, distorting a substantial difference between the two terms. The term *barbaros* (…) corresponds to a means of naming the Other, the non-Greek (…) *xenos*, for its part, is essentially a foreigner who may or may not be Greek, who is welcomed into the home and connected to the host due to ties which are social or religious in nature"[68].

Metics were, therefore, free men, foreigners by birth, but who were living in Athens. They were recognized as having certain rights. Foreigners who settled in Athens had to report to the authorities in order to undergo a process of registration and enquiry, without which they could be pursued by the law and condemned to slavery. They were given accommodation in the *deme* and were subject to the control of the head.

They could not, namely, be full owners, bring public actions in court or legitimately marry a citizen. Despite this, they were protected by the public powers in the same way as citizens were, and could exercise any economic activity and participate in religious festivals. If a metic provided services to the city, he

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[67] FRANÇOISE PARISOT (coord.), *Cidadanias nacionais e cidadania europeia*, (2001), 49; MARIA DO CÉU FIALHO, Cidadania e celebração na Grécia antiga (2003), 13.

[68] MARIA DO CÉU FIALHO, Cidadania e celebração na Grécia antiga (2003), 13.

could receive privileges such as exemption from paying taxes and could obtain a fiscal and military status similar to that of citizens. Metics performed a very important role economically speaking. They had the monopoly in industrial activities such as ceramics and metallurgy. A large number of them were also engaged in retail and they also had an important presence in the banking world and in naval armaments[69]. The role of metics in the world of the arts and culture was also unquestionable. The great philosophers, with the exception of Socrates and Plato, were all metics.

This distinction, therefore, paved the way to differentiated treatment. Thus, the *xenos* – a foreigner to the city but a member of the Greek world – was welcomed with hospitality. He was not recognized as a subject in law but could benefit from some legal protection. One might say that this was a kind of derived citizenship which could be called "honorary", which some foreigners benefited from[70].

This form of derived citizenship – "honorary citizenship" – sought to strengthen the ties between the peoples from different Greek city-states, by granting some legal protection to their citizens, via the creation of a wider political community based on mutual recognition. Political identity was truly achieved by Pericles in the fifth century b.C.. Many citizens dedicated a large amount of their time to the public cause. This was only possible because much of Athens' economic activity was guaranteed by the metics and slaves who, unlike in the other cities in Attica, ensured

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[69] JACQUES ELLUL, *Histoire des institutions* (1972), 93.

[70] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 45; PHILIP BROOK MANVILLE, *The Origins of Citizenship in Ancient Athens* (1990), 5.

the economic sustainability necessary for the mass participation of the citizens, primarily after the decision was taken to provide remuneration for this participation.

A foreigner from within the Greek world was entitled to different treatment, based on the reciprocal nature of relationships between the cities, and benefited from a status of "near" citizenship. Barbarians, on the other hand, that is those who did not share the same cultural background as those from the Greek world, were not afforded any protection by the laws of the Greek cities.

We may, therefore, speak of several degrees of citizenship and methods of dealing with foreigners. This is, perhaps, the aspect which best allows the Greek city to be characterized as a factor of inclusion. Citizenship was clearly not only important in uniting the Athenians but it was also – albeit in a derived form – an element which brought together all the peoples that inhabited Attica. Only the barbarians were excluded, since the difference in the language and culture represented an insurmountable barrier to a deeper relationship.

Here we can see a clear correlation with modern times. On the one hand, the means of dealing with foreigners is similar. Following a period of distrust, there is a phase of euphoria, of cosmopolitanism. Then, once citizenship is understood as a factor of inclusion, certain potential is extracted from it, transforming it into a geometrically variable status, which allows the progressive inclusion of various categories of foreigners[71]. There are, therefore, clear similarities with the situation existing today within European citizenship

[71] FRANCISCO LUCAS PIRES, *Schengen e a comunidade de países lusófonos* (1997), 38.

or even citizenship of the Portuguese-speaking world. In areas of economic or cultural identity, the peoples promote progressive integration via the adoption of intermediate or derived citizenship statuses[72].

This similarity demonstrates that neither the idea of derived citizenship nor its integrating potential is an innovation of the contemporary period. Quite the contrary, these were in fact common practice in the Ancient Greek civilizations.

## 2. Citizenship in the Roman Empire

### a) The Roman "civitas"

One first difference that is immediately evident between citizenship in Rome and that in Ancient Greece relates to the territorial dimension. Rome's expansionist intention was clear, in opposition to the limiting of territory of the Greek city-state[73].

The strengthening of citizenship that we find in Rome is, therefore, completely understandable in the light of the development that occurred there regarding the uniting of peoples, beginning with the hegemony of Lazio, followed by the political unification of the Italian peninsula, and up until the struggle for domination of the Mediterranean and expansion of the empire[74].

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[72] JORGE PEREIRA DA SILVA, *Direitos de Cidadania e Direito à Cidadania* (2004), 57; PETER SCHUCK, *Citizens, Strangers and In-Between* (1998), 161.

[73] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 49.

[74] GIULIANO CRIFÓ, Cittadinanza: diritto romano (1960), 128.

The origins of citizenship were the result, as in Greece, of a deepening of social and family ties. Thus, the social concept of citizenship symbolizes a gregarious state and a sense of identity and of belonging to a certain group.

As in Greece, citizenship was also used in Rome, in this social dimension, as a means of integration. Indeed, it is at this time that citizenship transcends its purely social dimension and is transformed firstly into a political instrument and later into a legal one.

The size of the Roman Empire meant that its social and political structures needed to have a great capacity to adapt. As we will see, this is what happened to a large extent with citizenship.

Territorial expansion brought with it an unprecedented need to integrate peoples. As has been said, therein lies the biggest difference in relation to citizenship in the Greek city-state. In Greece citizenship was often used as an instrument of inclusion, to increase the support base of a governor, to overcome difficulties of a given time. In Rome the challenge for the concept was permanent and structural. It would not be possible to expand the Empire without having a structured vision as to the effects of that expansion on the population substratum of Rome and the new territories.

The notion of *civitas* has two meanings: it names the body of citizens and the individual legal condition of the *cives*[75].

Seen from the individual perspective, it denotes the status by which the individual is part of a socio-political community, where he is considered a subject in

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[75] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 49.

law. Indeed, the individual who enjoys *status civitatis* is a member of a legal community the effects of which are not extended to the foreigner. In a simple understanding of the concept, only the *cives* could have full legal capacity[76].

The origin of the concept dates back to the *pater familias*, who was the only person to possess full legal capacity. In Roman public law, this condition corresponded to the *caput* – the head of the family –, the individual who was granted *civitas libertasque*, and therefore had full capacity and freedom of action[77].

The actual idea of *status* is fundamental to an understanding of citizenship in Rome. By *status* we mean the condition in which the person finds himself in relation to the community. *Status* corresponds to an identification of the layer in society to which the person may gain access. From the legal point of view, *status* corresponds to the treatment received by each person in relation to the legal order. Thus, the set of rights and duties was defined according to the *status* of each citizen.

We may, therefore, distinguish three fundamental conditions: *status libertatis*, *civitatis* and *familiae*. Each of these corresponds to a different set of rights and duties, and the *paterfamilias* could be considered a full holder and, therefore, have access to all the *status*[78].

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[76] GIULIANO CRIFÓ, Cittadinanza: diritto romano (1960), 128.

[77] GIULIANO CRIFÓ, Cittadinanza: diritto romano (1960), 129; PIETRO COSTA, *Cittadinanza* (2005), 13.

[78] These definitions were recovered and updated by JELLINEK as a means of expressing the political participation of citizens. Thus, for JELLINEK the individual could present three different positions before the State: *status libertatis*, *status civitatis* and *status activae civitatis*. According to JORGE MIRANDA, there are "three categories of rights that are interjected: rights of

Besides positioning the individual in terms of the legal order, each of these statuses represented his condition in society itself. Thus, citizenship in Rome – similarly to that which had already occurred in Greece – was not disconnected from a deep set of social relations which were projected into public life. This projection would lead to legal consequences which were of relevance regarding the way the individual was treated.

The *status libertatis* signified the individual's condition in society. Ultimately, it was a form of knowing the legal capacity of persons insofar as freedom was a condition for access to this capacity. The result of this was, naturally, a clear exclusion of slaves, both from exercising and from holding most rights. It is, in fact, an extension of the Greek concept, which – it will be remembered – already excluded from citizenship all those who were not free since freedom was a presupposition for the exercise of rights and participation.

There is an obvious connection between *status civitatis* and *status familiae*. The legal configuration of citizenship sought to guarantee the family unit. This basic unit provided the guarantee that society would be controlled by small groups whose projection formed a larger whole. The *cives* began at home, demonstrating his capacity for control. It is not by chance that the *caput – paterfamilias* – was considered to be the paradigm of the citizen, thereby guaranteeing him access to most rights. As we know, the function of head of family was of great social importance in Rome and

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freedom, the object of which is positive provision of the State; civic rights – in some sense used by legal theory – the object of which is positive provision of the State, of other public entities and of society as a whole in the interest of its subjects; and political rights, the object of which is the interference of persons in the actual activity of the State, in the formation of their will. See JORGE MIRANDA, *Manual de Direito Constitucional* (2010), 85.

was particularly relevant in legal terms. The same was true with regard to citizenship. Family relationships were projected into the wider panorama of society.

Furthermore, the connection between citizenship and family was decisive inasmuch as it was present in the most relevant connecting element – of the time – for awarding citizenship: *ius sanguinis*. In this case it revealed the personal *status* of the individual that was conditioned by the social reality[79].

Historical developments in Rome, along with social change, projected the status of citizenship to within the field for defining the status of the individual. While many variations of the concept were based on ideas already known in Greek civilization, Roman social organization was particularly responsible for turning citizenship into a status.

It is true that the transformation of citizenship into a legal concept had already been seen. What happened now, however, was its institutionalization. It was transformed into a legal status which characterized the citizen regarding his ability to hold or enjoy a significant range of rights.

### b) The awarding of citizenship in Rome

Originally only the *cives optimo iure* resident in the city-state enjoyed full legal capacity[80]. Inhabitants of the *municipia*, annexed to Roman territory and considered colonies, were considered *civis sine*

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[79] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 248-251.

[80] JACQUES ELLUL, *Histoire des institutions* (1972), 314; GIULIANO CRIFÓ, *Civis: La cittadinanza tra antico e moderno* (2005), 25.

*suffragio*[81]. This rule placed the *municipes* in a special relationship with Rome, although it afforded them full use of their municipal citizenship[82]. However, the lack of voting rights demonstrated that the *municipes* were not members of the community.

As a rule, citizenship was granted at birth. A child would be a citizen of Rome if he were: i) a child of parents with Roman citizenship; ii) the child of a Roman father who had married the child's non-Roman mother by means of a marriage which was provided for in Rome.

Thus, as has been said, the awarding of citizenship in Rome was initially strictly restricted to the city. It is true that there was a provision for the extension of some rights to inhabitants of annexed cities, although they were denied the central political rights.

The great challenge that Rome presented for the concept of citizenship was precisely related to the expansion of the territory and the need to include the inhabitants of the new territories in the vast expanse that was to become the Roman Empire. Thus, the development of the technical rules on awarding citizenship stemmed largely from the expansion of the Empire and the consequences of this expansion for the original conception of citizenship.

As a result of this need, in addition to acquiring citizenship by birth, it was also possible to acquire it by public decision, predominantly for individuals who did not live in Rome but who had privileged relations with the city.

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[81] GIULIANO CRIFÓ, Cittadinanza: diritto romano (1960), 129; Id., *Civis: La cittadinanza tra antico e moderno* (2005), 33, GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 51.

[82] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 291.

It is not known when the Romans first began to grant citizenship to those living outside the city of Rome. There are, however, records of some form of citizenship being awarded to Carthaginian deserters who settled in Sicily at the end of the third century b.C.[83].

It was rare for citizens who were not from Rome to be granted full citizenship[84]. The Roman's careful approach with regard to granting citizenship is particularly evident if we look at the issue of loss of citizenship. Thus, all Roman citizens who settled in another territory were deemed to have lost Roman citizenship while they remained in that location. They were able to recover their citizenship if they returned to Rome.

The underlying principle here is, nevertheless, surprisingly modern. Indeed, the rule outlined in the paragraph above sought to ensure that each individual was a citizen or member of the community in which he actually resided. This rule is no more than an ancient manifestation of the current principle of effective connection, according to which the acquisition and maintenance of citizenship depends on an effective connection between the citizen and the State. Thus, in Rome an element of effective connection was required before citizenship could be granted and the loss of that connection implied the loss of the citizenship itself. This rule permitted the first signs of an as-yet hidden influence, of *ius soli*, which up until that time had been overshadowed by *ius sanguinis*.

The generalized granting of citizenship only began in the second century b.C.[85]. At that time numerous

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[83] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 291.

[84] JACQUES ELLUL, *Histoire des institutions* (1972), 315.

[85] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 294.

awards of Roman citizenship were registered by Pro-consuls as a reward for services to Rome. With the proliferation of these awards, the problem arose as to what exact status these individuals could enjoy in Rome, and what relationship they maintained with their community of origin.

At that time, the idea that Roman citizenship was incompatible with other citizenships was abandoned and the concept of dual citizenship was born[86]. Yet doubts still remained. Apparently, those who held dual citizenship were governed by the laws of Rome in relation to their personal status, although they were not prevented from participating in the public life of their communities of origin.

*Lex Iulia* of 90 b.C. and *Lex Plautia Papiris* of 89 b.C.are clear examples of the expansion of the granting of citizenship with the aim of promoting inclusion[87]. Via these laws, Roman citizenship was granted to a large number of the inhabitants of the Italian Peninsula, from Cisalpine Gaul to Sicily[88].

The need for inclusion was immediately felt in the territories that were annexed to Rome. For this reason, the *municipes* were the first to be recognized as citizens. This was firstly *sine suffragio*, but later *optimo iure*. However, as time went on, the increasing establishment of the Empire in more distant lands forced a rethink of citizenship beyond the physical limits of the Peninsula.

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[86] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 295.

[87] SEBASTIÃO CRUZ, *Direito Romano* (1969), 84.

[88] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 52.

The need to include the Greeks was the cause of a further impact on the rights of foreigners and, later, on the generalized granting of citizenship. During the first century b.C., the emperors frequently granted Roman citizenship to persons from the East. However, no instrument is known of which entitled persons from the West to acquire Roman citizenship. Since there does not appear to have been a law which institutionalized the granting of citizenship to the Greeks and other peoples from the West, it is clear that, at least from the time of Augustus' reign, Greek citizens could benefit from Roman citizenship without, by reason of this, having to give up a politically active life in their communities of origin. In any event, it appears that the granting of citizenship always stemmed from an individual initiative, probably for important services provided to Rome[89]. In any case, citizenship was awarded by the Emperor on the advice of the pro-consuls. If these awards were initially rare, it was largely because it was impossible for the pro-consuls to intervene. In fact, only military chiefs were able to suggest these awards to the Emperor. Later, the actions of the pro-consuls were decisive. Being able to see close hand, they had a clear idea of the importance of granting citizenship as a means of inclusion.

Finally the *Constitutio Antoniana* figures as an undeniable mark in the history of Roman citizenship. In 212 AD, the Emperor Antoninus Caracalla decided to extend Roman citizenship to all free inhabitants of the Empire.

From that moment on all subjects of the Empire were also citizens and could invoke the protection of Roman law. This award of citizenship was therefore an advantage to unifying the legal systems. Inclusively, it

[89] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 310.

would eliminate conflicts in law that resulted from the co-existence of different legal orders within the Empire[90].

Despite its general character, the edict excluded certain categories of persons. Those excluded from Roman citizenship were barbarians who lived in the areas near the border who had a low level of Romanization, most rural populations and the *dediticii*. This exclusion demonstrated that Caracalla had not ceased to consider citizenship as an instrument of inclusion dependent on more or less strict connecting elements. In fact, citizenship was not granted across the board but rather there was a concern to award it to those who were capable of being integrated or included, and leave out those who did not demonstrate much hope of integration.

It is important to note that Caracalla's edict had one immediate purpose – the Romanization of the Empire. It was not simply a question of increasing the population's affection for the Emperor. The effect of the measure was to accelerate the Romanization of the law and administration of the colonies. The ubiquity of individuals with Roman citizenship and their demands for trial in line with the privileges of their status had long promoted the acquisition of citizenship, or at least made Roman law familiar throughout the Empire. As more and more people were being tried according to Roman law, legal activity became more homogenous across the Empire[91]. Furthermore, as SEBASTIÃO CRUZ states, "the "inflation" of citizenship caused an "inflation" of *iurisprudentia*. There was a need to

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[90] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 52.

[91] PIETER RIESENBERG, *Citizenship in the Western tradition: Plato to Rousseau* (1992), 82-83.

quickly create more jurists, especially in the provinces, to now apply the Ius Romanum to all the subjects of the Empire; its value began to decrease greatly. This was the great "provincialization" of classic Roman Law. The move was underway towards it becoming vulgarized"[92].

Despite these difficulties and its immediate purposes, the *Constitutio Antoniana* had merit in that it constituted an element of unity within the Empire. Indeed, at one point, it was the element that joined the various units of the Empire, bringing it together around one common system of law[93]. Given the lack of cultural elements that might ensure this unity, Roman citizenship, together with the application of law, created the necessary and sufficient ties to maintain the community[94].

Roman citizenship created a class of trans-local, multi-ethnic and multi-linguistic persons who formed an as-yet unknown concept: that of an "international legal community"[95].

We may, therefore, speak of a unifying sense of Roman citizenship and the creation of a vast community, based on exclusively legal ties. Throughout history, whenever it has proved necessary to unite communities that do not share other ties beyond economic and legal ones, citizenship has always played a fundamental role.

The connections with modern times are clear. We may immediately point to the American example. A State of immigration, formed from the cosmopolitanism of disparate communities, unites around the

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[92] SEBASTIÃO CRUZ, *Direito Romano* (1969), 85.

[93] ADRIAN SHERWIN-WHITE, *The Roman Citizenship* (1973), 223.

[94] GIULIANO CRIFÓ, *Civis: La cittadinanza tra antico e moderno* (2005), 34.

[95] ULRICH PREUSS, *The ambiguous meaning of citizenship* (2003), 5.

Constitution and citizenship. The Constitution, a symbol of the union of the American people, begins with the words "We the people".

This same feeling is also evident today in the context of the European Union. The creation of citizenship of the Union in the Maastricht Treaty has, precisely, this unifying purpose, of creating a community of persons, rather than a mere economic community. As Jorge Pereira da Silva expressively states, "the evolution of the European construction means that addressing the issue of citizenship has become unavoidable. In fact, it would not be possible to advocate any form of European political construction without creating a "Europe of the citizens"[96], oriented towards satisfying the needs of its peoples and to the creation of a collective awareness of a European people. Besides the legal consequences that the route taken by the Member States implies, it is important not to underestimate the symbolic relevance that the idea of European citizenship carries, above all at times when the European construction is at its most fragile"[97].

### c) Treatment of the foreigner

One initial form of protection for the foreigner in Rome resulted from the adoption of the institute of *hospitium*. This consisted of the possibility of a citizen providing protection for a foreigner. This protection involved protecting the rights of the foreigner[98].

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[96] FRANCISCO LUCAS PIRES, Múltiplos de cidadania: o caso da cidadania europeia (1997), 68-69.

[97] JORGE PEREIRA DA SILVA, *Direitos de Cidadania e Direito à Cidadania* (2004), 59-60.

[98] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 60.

Foreigners – *peregrini* – were divided into two categories: *civitates peregrini* and *peregrini*. The first category related to foreigners who already belonged to urban communities that predated the Roman conquest. These were considered *peregrini alicuius civitatis*. Owing to this status, they benefited from legal protection which could be invoked in court before the *praetor peregrinus*. The other group, the *peregrini*, whether it was because they were not organized in urban communities, or because the communities they belonged to were the object of punishment, did not enjoy any rights[99].

Foreigners who were not considered to be guests in Rome – *hostis* – could enjoy some protection, although they were denied access to political rights. These rights were recognized by means of the *ius gentium* applicable to the non-Romans with whom Rome maintained close ties. As time passed, the *hostis* eventually ceased to be *hostis* and became fully integrated into the community.

Even so, foreigners were afforded some prerogatives. Firstly, they could trade in Rome, later there was the *ius conubium* – the possibility of marrying a Roman citizen and, lastly, there was *ius testamenti factio* – the possibility of being a beneficiary in the will of a Roman citizen.

Even before full citizenship was granted first to the Italian peninsula and later to the whole Empire, there was, as previously indicated, an intermediate form of citizenship. This was the *cives sine suffragio* as opposed to the *cives iure optimo*. The former were integrated foreigners who were given the rights of

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[99] GIOVANNI CORDINI, *Elementi per una teoria giuridica della cittadinanza* (1998), 61; GIULIANO CRIFÓ, *Civis: La cittadinanza tra antico e moderno* (2005), 39.

citizens, namely the right to act in court in defense of their own rights. However, they were not given the right to vote or to be elected to public office.

The treatment of foreigners in Rome underwent great changes as a result of the *Constitutio Antoniana*. The whole range of relationships which had been established to differentiate between the Roman and the foreigner ceased to have any meaning once the *Constitutio Antoniana* had been passed.

The distinction between the *cives* and *peregrini* had long been losing strength due to the variations in the intermediate statuses which had been created in the meantime. The most important distinction, at the time, was between the individuals who were subject to *ius gentium* and the others – *dediticii* – who did not benefit from any legal protection[100].

Once the Romanization of law had begun in the *municipia* which were closest, it soon began to expand throughout the Empire. The proximity, in geographical terms, was, nevertheless, decisive in the early times for the easier acquisition of citizenship.

It is clear that the progressive integration of foreigners aided the Emperor Caracalla in deciding to award Roman citizenship to all inhabitants in the Empire. In fact, many of them already benefited from the protection of Roman law as a consequence of the *ius gentium*.

In short, the treatment of foreigners in Rome changed in line with the status of citizenship. Whereas foreigners were all initially treated in the same way, different types of foreigners then began to be treated

[100] GIULIANO CRIFÓ, *Civis: La cittadinanza tra antico e moderno* (2005), 39.

differently and finally Roman citizenship was granted to all inhabitants in the Empire.

## §4. Citizenship in the Middle Ages

In the Middle Ages the structure of society changed radically from that which existed in the ancient civilizations in Greece and Rome[101].

In Europe the dispersal of the social fabric produced a dissemination of fortified cities under the protection of the ruler. Even in cases where there was a king or a kingdom, the king was often a "primus inter pares" whose authority was no greater than that of other nobles in control of significant cities.

Outside the cities there was an almost entirely rural society; a land of danger and the unknown. Knights provided most of the protection in and outside the city. They constituted the army at the time, at the service of a given ruler.

Regarding the organization of society, the Middle Ages were characterized by a feudalistic society, meaning that the landowners possessed privileges over the land workers, most of whom agreed to work the land in a situation almost equivalent to slavery.

In terms of legal knowledge, the Middle Ages were characterized by the *consilia* and *responsa* of eminent jurists. In a way, "*the task of many generations of medieval lawyers was to understand and assimilate the ancient law to their own realities*"[102].

Chief among these jurists were Acursius, Bartolus de Sassoferrato and Baldus de Ubaldis. "*The law they interpreted, known as ius commune, or common law,*

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[101] MAX WEBER, Citizenship in ancient and medieval cities (1998), 48.

[102] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 37.

*was composed of the ancient Roman law and all the medieval glosses and commentaries on it"*[103].

The law in the Middle Ages was basically the adaptation of the Roman law to the medieval times according to the comments of these jurists.

According to Riesenberg, "*there is not a single formal treatise on citizenship, nor a single medieval citizenship act comparable to that of Caracalla in 212*"[104]. This meant that the medieval law of citizenship had to be found in the commentaries of the said jurists.

In the societal structure described above, citizenship gains a renewed importance, not so much for its political participation dimension – although this was also present in the Middle Ages – but particularly for the status of protection it conferred.

A citizen would not only be able to engage in business in the city, but would also seek its protection – like a warm blanket – in times of war and turmoil. It was very important for a person to know that he could count on the protection of the city and its fortified walls and knights. That was especially evident in the case of land workers outside of the city walls that would seek refuge in the city in the case of a war[105].

So knowing who the citizens were was a critical question in the Middle Ages, not necessarily for the exact same reasons as in the classical times.

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[103] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 37.

[104] PIETER RIESENBERG, *Citizenship in the Western tradition: Plato to Rousseau* (1992), 43.

[105] MAX WEBER, Citizenship in ancient and medieval cities (1998), 47-48.

As in modern times, in medieval cities citizenship could be acquired by birth or by naturalization[106].

According to Accursius, naturalization demanded a commitment of ten years' residence and fulfillment of civic obligations. For Bartolus de Sassoferrato it was enough that a man moved most of his resources from one place to another to establish residence. Baldus de Ubaldis claimed that a citizen must love his city; it was not enough to live quietly and pay taxes. He would be required to obey its laws, live in town, and desire to support his city even against the family[107].

It is particularly significant that the most influential jurists and commentators in the Middle Ages gave such importance to residence. In fact, the law at the time was largely influenced by the perceptions of these jurists regarding the classical rules and regulations.

It is understandable that residence played such a crucial role at the time. In moments of war and turmoil the city would work as a shelter for those living within its walls. It was not so much a matter of political participation but rather a question of protection. So those who put themselves under such protection by residing within the walls of the city ought to be considered citizens.

It is especially interesting that Accursius even considered a specific time frame of ten years. As I will develop in chapter 6, that is precisely the time frame that we should consider nowadays as relevant for naturalization.

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[106] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 50.

[107] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 41.

This means that ten years' residence as a qualifying criterion for naturalization is not only rooted in modern-day citizenship practices adopted around the world, as revealed by recent surveys, but was already a relevant criterion in the Middle Ages.

Other commentators, although not considering or daring to risk a specific time frame, all referred to residence as a qualifying criterion for naturalization. This means that residence was always considered as a relevant factor for naturalization. It is deeply rooted in the Western legal tradition.

Assimilation in a given community started with residence. Other factors may also have had an impact. Jurists could be stricter or more lenient with regard to naturalization. This might have entailed objective factors, such as paying taxes, belonging to an army or contributing to the city, or moral factors, such as allegiance to or love of the city. However, residence was a common factor and the beginning of any assimilation process without which naturalization would not be possible.

In short, naturalization was perceived as a common and deep-rooted means of acquiring citizenship based on residence.

Of course this protection came at a price. Gradually the classical concept of *cives* evolved into a medieval one of *subditus*[108]. This revolution in the late Middle Ages corresponded to the formation of the State that I will describe later in this chapter.

As Pocock describes it, "*the advent of jurisprudence moved the concept of the "citizen" from the zoon politikon toward the legalis homo, and from*

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[108] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 46.

*the civis or polites toward the bourgeois or burger. It further brought about some equation of the "citizen" with the "subject", for in defining him as the member of a community of law, it emphasized that he was, in more senses than one, the subject of those laws that defined his community and of the rulers and magistrates empowered to enforce them (...) what is the difference between a classical "citizen" and an imperial or modern "subject"? The former ruled and was ruled, which meant- among other things that he was a participant in determining the laws by which he was to be bound*"[109].

This is coherent with a vision of citizenship - maybe with the exception of Marsilius de Padua – which is less connected to political participation and more focused on protection against war. It is certainly in line with the medieval societal structure and its feudalistic approach[110].

The fading of the democratic dimension of citizenship in the late Middle Ages led some scholars to consider that citizenship almost disappeared at that time[111].

In a way this is the same kind of crisis that advocates of the decline of citizenship theory point out with regard to citizenship nowadays. It is not possible to identify a single citizenship element and, in its absence, the crisis of citizenship or even its disappearance is proclaimed.

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[109] J. G. A. POCOCK, The ideal of citizenship since classical times (1998), 39-40.

[110] MAX WEBER, Citizenship in ancient and medieval cities (1998), 47-48.

[111] BENITO ALAÉZ CORRAL, *Nacionalidad, ciudadania y democracia*, (2006), 32.

As I will later elaborate on, citizenship is composed of a complexity of elements and an absence of one does not necessarily create a crisis.

It is certainly true that the democratic dimension faded in medieval times. It is clear that the citizen became a subject.

Once again, however, this episode is very useful when tracking the history of citizenship. One of the most important phases in the history of citizenship was the passage from the subject to the citizen. This did not occur, at least from an international standpoint, in the modern state until the 20th century, with the evolution of the individual's position in international law. Again, from the same standpoint, the democratic principle is still not globally recognized, as I will later develop.

In this sense, the notion of protection within the city walls and the concept of citizenship as a warm blanket for those residing in the city are crucial to a full understanding of the concept and its evolution. Thus I do not agree with the theory that the passiveness of the citizen in the Middle Ages constituted a denial of the very concept of citizenship.

This is not to purport that the democratic dimension is irrelevant. Quite to the contrary, I consider it to be of utmost importance in the citizenship context insofar as it belongs to the very nature of citizenship or democratic citizenship.

Yet the fact that societies were undemocratic does not mean they did not have citizenship. This was so in the Middle Ages just as it is today. We might not consider it democratic citizenship but it is some form of citizenship.

In any event, citizenship in the Middle Ages was a more passive concept than it was in the classical times. The classical concept of *vita activa* gave way to a concept of *vita contemplativa*, where every member of

society had to accept his position in the chain of hierarchy with little or no ambition to actively participate[112]. In a way this is the denial of the classical concept of citizenship but not necessarily of citizenship itself.

Another important contribution of medieval citizenship to the concept of citizenship, particularly regarding naturalization, was the equality of born and naturalized citizens. According to the commentators, since all citizens were subject to the same citizenship law, regardless of whether they were born or naturalized, this subjection blurred the differences between them. This meant that it was not acceptable to legally differentiate between citizens of origin and those naturalized[113].

It is undisputable that citizenship acquired a different meaning and format during the Middle Ages, especially if we compare it with the classical times. The difference is well explained by the radical changes in the fabric and organization of society in the Western world.

In my view these changes were very important for the evolution of the concept and for its later understanding. As Riesenberg wisely sums up, "*during the medieval centuries a strong tie was established between the city and the citizen based on mutual need and service. Given the strong cultural element in this form of bond, no change of the form of government was strong enough to change it. It lasted through the Renaissance, survived the period of princely authority,*

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[112] J. G. A. POCOCK, *The Machiavellian Moment* (1975), 56.

[113] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 45.

*the unification of Italy and into the modern Italian democracy*"[114].

[114] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 42.

## §5. The French Revolution and the concept of citizenship

It is often said that the French Revolution invented the modern concept of citizenship. According to Rogers Brubaker, "*modern national citizenship was an invention of the French Revolution. The formal delimitation of the citizenry; the establishment of civil equality, entailing shared rights and shared obligations; the institutionalization of political rights; the legal rationalization and ideological accentuation of the distinction between citizens and foreigners; the articulation of the doctrine of national sovereignty and of the link between citizenship and nationhood; the substitution of immediate, direct relations between the citizen and the state for the mediated, indirect relations characteristic of the ancien régime—the Revolution brought all these developments together on a national level for the first time*"[115].

The long medieval period is often forgotten or erased from the history of citizenship. "*Diderot, for example, presented citizenship in the Encyclopédie in terms of an ancient city-state, ignoring the long medieval past*"[116].

The lack of medieval citizenship studies, although understandable, is totally unjustifiable given the importance of this period for later developments, even those of today.

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[115] ROGERS BRUBAKER, *Citizenship and nationhood in France and Germany* (1992), 35.

[116] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 78.

It is, however, understandable since with the French revolution citizenship gained an unparalleled and unprecedented relevance, at least in comparison with the medieval times.

As Brubaker describes it, "*the pervasiveness of privilege in ancien-régime society left no room for the common rights and obligations that make up the substance of modern citizenship. The distinction between citizens and foreigners had neither ideological nor practical significance. Foreigners suffered few disabilities, and the most significant of these, in the domain of inheritance, had been largely removed by the late eighteenth century. Citizenship was not consistently defined or systematically codified; it was determined in an ad hoc manner in particular cases to make it accord with legal judgments about inheritance rights. The Revolution was to change all this*"[117].

A crucial part of the French revolution was the idea of equality between citizens. The "Declaration des droits de l´homme et du citoyen" denotes a clear and consistent concern for human rights and citizens' rights.

As Riesenberg acknowledges, "*in all the political literature that surrounded the French Revolution, citizenship assumed a principal place. "Citizen" became a favored form of address used by members of every class. It appears in constitutional documents, in the cahiers drafted in anticipation of the 1789 meeting of Estates General, and in the Declaration of the Rights of Man and Citizens of 1789. In all these texts "citizen" is used variously, but especially in preambles and other places of a conceptual, programmatic nature; and when*

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[117] ROGERS BRUBAKER, *Citizenship and nationhood in France and Germany* (1992), 39.

*it is used, it refers to an important aspect of a man's condition, his political role and duties*"[118].

In this sense the importance of citizenship for the French Revolution is also unquestionable and represents a bold break with the medieval past. Citizenship, in a way, played a very egalitarian role. In order to break with the rigid class differentiation from the ancient regime, a concept was needed that would work as a unifier of the societal fabric. This would have to be citizenship. Only citizenship would be capable of uniting nobles, clergy, bourgeois and people under the same category. Only citizenship could equalize the third estate, as described in the words of Abbe Sieyès.

Although an inclusive concept, citizenship had important consequences in the French Revolution. It already entailed a number of rights and obligations, including political rights.

For that purpose, a rigorous definition of citizenship was needed. As Brubaker says, "*the crucial point about citizenship, from this perspective, is that an immediate, direct form of state-membership replaced the mediated, indirect forms of membership characteristic of the ancien régime. From this transformation in the structure of membership, the state gained both greater resources and greater control. The "immediatization" of membership permitted an expansion of direct taxation, replacing the old system of tax farming, based on contracts with largely autonomous corporations. It permitted the state to demand military service from every citizen, and directly to regulate foreigners. The strengthening of the state through the "immediatization" of membership depended, however, on the legal rationalization and*

[118] PETER RIESENBERG, *A history of citizenship: Sparta to Washington* (2002), 83.

*codification of membership. To demand services from its citizens or to exclude or regulate noncitizens, the state had to be able to determine unambiguously who was and was not a citizen. In this domain, too, the Revolution marked a decisive stage in the development of citizenship. The Constitution of 1791 contained the first formal, explicit delimitation of the citizenry carried out by a western territorial state*".

In fact, for the first time, a codified regulation of citizenship appeared in the Constitution. According to Title 2, numbers 2 and 3:

*2. French citizens are:*

*Those who are born in France of a French father;*

*Those who, born in France of a foreign father, have fixed their residence in the kingdom;*

*Those who, born in a foreign country of a French father, have become established in France and have taken the civic oath;*

*Lastly, those who, born in a foreign country and descended in any degree whatsoever from a French man or a French woman expatriated on account of religion, may come to live in France and take the civic oath.*

*3. Those residing in France, who were born outside of the kingdom from foreign parents, become French citizens after five years of continued domicile in the kingdom, if they have in addition acquired real estate or married a French woman, or formed an agricultural or commercial establishment, and have taken the civic oath.*

These rules already reveal a balanced combination of the *ius sanguinis* and the *ius soli* rule, on one hand, and, on the other, a clear and consistent path to citizenship through naturalization.

In fact, naturalization was available under three prerequisites: period of residence; establishment of

business, activity, acquisition of real estate or marriage; and civic oath.

The foundations of modern citizenship show, with regard to naturalization, that the basic principles were there from the beginning. Naturalization was a possibility for all those who resided in the territory. The necessary period was not very long – 5 years, consistent with current surveys of naturalization practices, as I will later describe. The demand for establishment could be related, as today, to the effective link theory: there had to be an effective link between the person and the territory of the state where he intended to become a citizen. Of course nowadays residence would suffice to fulfill this prerequisite. However, it is understandable that at that time it might have been more difficult to prove residence, and therefore an additional element was required. In any event, it does not seem an impossible prerequisite, as any permanent resident would have been able to show either one of those elements.

This means that citizenship in the French Revolution was not only an inclusive and egalitarian concept; it was also a clear and transparent legal category that anyone could acquire.

Of course, as usual, it is necessary to qualify what has just been said. Only active men were able to access citizenship. Women were still excluded from the status, as were "passive citizens", somewhat reminiscent of the medieval ideal of *vita contemplativa*.

There was evidently a democratic dimension of citizenship in the French Revolution. In that sense it reinterpreted the classical citizenship concept. As Brubaker points out, "*as a democratic revolution, the French Revolution institutionalized political rights as citizenship rights, transposing them from the plane of the city-state to that of the nation-state, and*

*transforming them from a privilege to a general right. The Revolution, to be sure, did not in practice fully institutionalize political rights as general citizenship rights. Women were excluded, as were the citoyens passifs. Nonetheless, the Revolution was decisive for the development of the modern institution of national citizenship. As a democratic revolution, it joined the substantive and formal definitions of citizenship, the classical Republican and modern conceptions. Attaching the content of the classical definition—participation in the business of rule—to the generalizing, inclusive form of the modern definition, it made political participation a general rather than a special right. It followed the program of absolutism in making citizenship a general rather than a special status. But it also followed the classical tradition in making participation in the business of rule, if not constitutive of citizenship, at least essential to citizenship*".

This means that the democratic principle is also present in the very definition of modern citizenship and is inextricably linked to it. That is why, as I will develop in chapter 6, intentions to decouple citizenship from its democratic dimension are not successful. It is certainly possible to identify citizenship in undemocratic states but it certainly does not correspond to the concept in its pure form and cannot be called democratic citizenship.

All the French citizens possessed political rights but only active citizens could exercise these rights. According to Troper, "*the inhabitants of France could thus be classified and divided up into four large concentric circles, the largest of which comprised all the inhabitants. Only those who met the conditions laid out in Article 2 were French citizens and these included women and minors. These made up the intermediate circle; from which only foreigners were excluded.*

*Because foreigners exercised the same civil rights as the French, their exclusion proves, once again, that even passive citizens had political rights refused to foreigners. The third circle comprised only active citizens. Finally the smallest circle was formed by those who fulfilled the conditions to be electors*" [119].

The idea of concentric circles is very useful to explain the different layers of citizenship rights. As I will develop in chapter 6, different layers of rights correspond to the relative position of different classes of people in society. Unlike in the Middle Ages, where society was stratified vertically by social class, the Revolution initiated a tradition of concentric citizenship circles. This means that all citizens belonged to the community but not all were entitled to the same rights, especially political rights.

From the outer circle to the inner circle, the entitlement and enjoyment of rights grew. An important characteristic of this system is that the inner, and smallest, circle controlled access and evolution from one circle to the next.

The system still works like this in current times. This probably dates back to classical citizenship, but reshaped by the French Revolution. As I will try to demonstrate, global citizenship tries to cope with this tradition by making the transition automatic rather than relying on the decision of those included in the inner circle.

In any event, the egalitarian nature of citizenship in the French Revolution is a very important aspect that gains renewed significance these days. The only discrimination admitted – as today – was related to

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[119] MICHEL TROPER, The concept of citizenship in the period of the French Revolution (1998), 34.

political rights. As Brubaker underlines, "*the preamble to this Constitution proclaimed that there would be "no privilege, no exception to the common law of all Frenchmen." Yet outside the domain of political rights, the "common law of all Frenchmen" applied equally to foreigners. The Rights of Citizens seemed to be dissolved into the Rights of Man. The Constitution of 1793 even extended political rights to most foreigners*"[120].

This notion is very important and was probably only interpreted properly much later in the age of Universal Human Rights, as I will later develop in chapter 5, yet it was clearly stated in the documents of the French Revolution that citizenship is not an appropriate instrument to exclude foreigners from the exercise of civil rights. Being a concept related to the organization of society, citizenship is only appropriate for attributing or denying rights specifically related to that organization, such as political rights, a and not rights that are related to personhood and must be recognized for all human beings. By stating "rights of man and citizen", the Revolution and its declaration already proclaimed that some rights were inherent to all men, regardless of their citizenship status.

To sum up, with Brubaker, "*as a national revolution, the French Revolution shaped the institution of modern citizenship in several distinct ways. By leveling legal distinctions inside the nation, it gave a common substance to citizenship: civil equality. By valorizing the nation and the idea of national citizenship, it created the ideological basis for modern nationalism, in its domestic and international expressions. And by defining precisely who was French,*

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[120] ROGERS BRUBAKER, *Citizenship and nationhood in France and Germany* (1992), 45.

*it provided a technical basis for denying certain rights to or imposing certain obligations on foreigners*"[121].

[121] ROGERS BRUBAKER, *Citizenship and nationhood in France and Germany* (1992), 48.

## II – International law of citizenship

### §1. Background

Significant changes have occurred in the international law of citizenship.

During the 19th century, international law had nothing or little to say about citizenship. It was considered to be a matter related to the sovereignty of the states[122].

At the beginning of the 20th century citizenship increasingly became a subject of dispute among states, especially because it was relevant for the legal treatment and status of foreigners in a given country.

In a world of States, international law's function was to resolve disputes that might arise among them.

Citizenship, despite its unquestionable internal dimension, always had a strong international dimension. In that respect, for a State there were two categories of persons: the citizens and the foreigners. That is why those who would not fit into these two categories – the stateless and the dual citizens – were perceived as abominations[123].

Thus, a first line of intervention for the international law of citizenship was basically to eliminate the phenomena that might constitute an obstacle to the stabilized way of looking at people in a given territory.

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[122] PETER SPIRO, A new international law of citizenship (2011), 698.

[123] PETER SPIRO, *Dual Citizenship as Human Right* (2010), 111.

That is also why diplomatic protection was so important in the early definition of an international law of citizenship[124].

Citizens would deal – at all different levels – with their state. Foreigners would benefit from diplomatic protection and representation from their home State.

International law was the law of States, not the law of individuals. Individuals would relate with their own States and then States would relate with each other.

From 1920 to 1930 the international community was unusually active with regard to citizenship.

Firstly, citizenship was considered by the League of Nations to be one of the three areas that required codification by international law[125].

In 1929 one of the most interesting enterprises in the history of international citizenship law was launched: the Harvard project.

According to John P. Grant and J. Craig Barker, "*the Harvard Research in International Law was conducted in four phases. The aim of each of the thirteen projects within these four phases was the preparation of a draft convention, representing the collective view of a group of Americans with special interest in the development of international law (and, though not stated, with expertise in the topic under investigation), in the hope that each draft convention would be "of interest" to, or "merit the attention" of, those involved in codifying international law. In his 1928 note announcing the Harvard Research, Manley Hudson said only that the research "should be undertaken along the general lines followed by the Institut de Droit International and the American Law*

[124] PAUL WEISS, *Nationality and statelessness in international law* (1979), 35.

[125] PETER SPIRO, A new international law of citizenship (2011), 700.

*Institute, with a director of research, with a reporter for each of the subjects to be considered …, and with advisers to assist each of the reporters. That brief description of how the Harvard Research was to be conducted for the nationality, State responsibility and territorial waters projects was essentially the procedure that was followed in all four phases of the Research*"[126].

Concerning citizenship, as highlighted by Ruth Donner, the Harvard Research prepared a draft Convention on Nationality, "*intended as preparatory work for the first League of Nations Codification Conference held in 1930*"[127].

The Harvard Draft Convention on nationality is still regarded as a founding moment in the international law of citizenship. Regardless of the contents, which largely referred to a conception based on a State's sovereignty over citizenship, for the first time there was a consolidated effort from a distinguished group of jurists to put together a draft international convention on citizenship. It certainly influenced the later developments in international citizenship law, especially the international conferences and conventions adopted not longer after.

In any event what is interesting to understand is that at the beginning of the 20th century citizenship, while still being considered an essentially domestic matter for each of the States, began to reveal its international character.

As Spiro elegantly phrases it, in reference to the principle that arose from the Harvard research, "*States could not, in other words, draw the lines of human*

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[126] JOHN P. GRANT and J. CRAIG BARKER, The Harvard Research: Genesis to Exodus and Beyond (2007), 7-8.

[127] RUTH DONNER, Nationality (2007), 41-42.

*community in an arbitrary, over- inclusive fashion, in much the same way that they could not redraw territorial maps to include lands to which they had no rightful claim*".

The international nature of citizenship is then clear. Citizenship was perceived as a fundamental element of states, much like the territory or the internal political organization.

As with the territory, conflict might arise. The definition of people is very important for the state's identity, and citizenship is seen as a connecting element used in international law (both public and private) for several purposes.

Even departing from a domestic reserved domain standpoint, multiple national citizenship regulations create the environment for conflicts of laws, both negative and positive[128].

Negative conflicts lead to statelessness. This phenomenon is still perceived as an undesired consequence of these conflicts and has been a difficulty since the beginning of international regulation on citizenship, as I -will show.

Positive conflicts lead to multiple citizenships. Despite the current vision on this matter – which I will develop in chapter 3 – positive conflicts were not desired in the early days of international regulation of citizenship. As Ruth Donner notes, according to the Harvard research, "*The first paragraph states: "Except as otherwise provided in this convention, a state may naturalize a person who is a national of another state,*

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[128] RUI MANUEL MOURA RAMOS, Nacionalidade, plurinacionalidade e supranacionalidade na União Europeia e na Comunidade dos Países de língua Portuguesa (2002), 5.

*and such person shall thereupon lose his prior nationality*"[129].

This was meant as a measure to avoid not only multiple citizenships but also the temptation of states to "steal" people from other states. There was also the idea of preventing "arbitrary" concessions of citizenship that was later developed in the Nottebohm decision as the "effective link" theory, which I will describe later in this chapter.

So the international relevance of citizenship was highly motivated by the attempt to regulate and prevent conflicts of citizenship laws – both negative and positive.

As I will develop later in this chapter, although there was an immense evolution resulting from the pressure of mass cross border migration movements, also motivated by significant changes in the very structure of international law, that makes it impossible to assess current international citizenship law from the viewpoint of the early 20th century, the same basic principles still persist.

This does not contradict my basic thesis. On the contrary, the fact that early developments in international law of citizenship were related to conflicts of national citizenship laws not only proves that international law has interacted with national citizenship law since early times but also that this interaction was not limited to reducing statelessness.

This interaction, as I will show in this chapter, existed in different times and areas of international citizenship law. It evolved in many ways and via various international instruments.

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[129] RUTH DONNER, Nationality (2007), 41-42.

## §2. The domestic reserved domain and The Hague Convention on certain questions relating to the conflict of nationality laws

There is a set idea that citizenship issues are inscribed in the reserved domain of the states.

The assertion is well founded in the tradition and the conceptual idea of the national state. In fact, the definition of the people is a prerogative of any political community. The legal instrument to define the people is therefore the national citizenship legislation.

Seen from this perspective, citizenship is embedded in the very notion of sovereignty. While there are few characteristics of a State that can be identified in the realm of sovereignty, citizenship is certainly one of them.

This notion helped the states to value citizenship as a precious gift, an instrument to achieve several internal goals, and, in a word, a powerful tool of the polity.

The notion of domestic reserved domain or exclusive domestic jurisdiction is not strange to international law[130]. The expression appears in Article 2(7) of the UN charter, which states that "*nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state*(…)".

A first question that should be asked though is who defines what matters shall be and shall not fall within the definition of "domestic jurisdiction"?

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[130] SATVINDER S. JUSS, Nationality Law, Sovereignty and the Doctrine of Exclusive Domestic Jurisdiction (1994).

If the states are to define this basic aspect of their intervention in the international arena, a reason not to comply with international law can be found.

Whenever a state wishes to escape from an international obligation it is a question of simply invoking the "domestic jurisdiction" clause and not complying with the said obligation.

It seems evident that the definition of the matters included in the "domestic domain" has to be international or from international law.

The so called "essentialist" approach to the notion was abandoned by the development of international law. It is now clear that it is no longer possible to affirm that all nationality questions are the exclusive concern of the states themselves[131].

Indeed, the Permanent Court of International Justice affirmed in the Nationality Decrees in Tunis and Morocco that "the question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question; it depends upon the development of international relations".

That is why it is crucial to understand the evolution of international relations and international law. It is not enough to say that citizenship belongs to the domestic reserved domain, according to national states – because it is not up to them to decide what belongs to the said reserved domain. Nor is it enough to answer that the question was resolved in past international court decisions – for the evolution of international relations and international law may have brought changes to the same answer.

The affirmation of the doctrine of the exclusive domestic jurisdiction was always accompanied by the

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[131] ANTHONY D´AMATO, Domestic Jurisdiction (1992).

affirmation of its limits. From the first international law courts' decisions and international treaties to the most recent decisions of European courts, there has been no single decision asserting the existence of this principle that did not express its limitations.

That is why it is possible to affirm that the domestic jurisdiction over matters of citizenship is a power conferred and limited by international law.

The boundaries to this power have often been expressed.

The Hague Convention on certain questions relating to the conflict of nationality laws signed in The Hague in 12 April 1930 establishes in Article 1 that "*It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality*".

This assertion certainly incorporates the principle which had long been affirmed by many authors that citizenship is an essentially national matter. Yet, along with this principle, limits to national sovereignty over citizenship have always been underlined. The Hague convention is very clear about these limitations: i) international conventions, ii) international custom and iii) principles of law.

Van Panhuys[132] identifies different sorts of limits on the State´s sovereignty over citizenship according to The Hague convention.

These limits can be of a diverse nature.

i) Firstly, regarding limitations deriving from international conventions, Van Panhuys refers to three

[132] H. F. VAN PANHUYS, *The Rôle of Nationality in the International* (1959), 158.

different types of conventions: those of self-executing character, those which impose legislative obligations on States and those which impose mere obligations of equal treatment among citizens.

Conventions included in the first type are the strongest in terms of limitations placed on the State in conferring citizenship. These conventions are typically of a positive nature since they prescribe the attribution of a certain citizenship to a class of individuals or to those who find themselves in a particular category.

The second type of convention still imposes a particularly strict limitation although these conventions do not come into force without the intervention of the States. They impose duties on the States to legislate accordingly. Failure to do so means that the State will be found liable in international terms or that specific sanctions set forth in the treaty will be imposed.

The third type of convention merely creates obligations to treat the citizens of the member states as their nationals would be treated. These were founded in the early stages of the European Economic Community. Although they do not interfere specifically with the State´s reserved domain with regard to citizenship, by extending the equality of treatment they reduce the scope of the decision to grant citizenship, in terms of rights, since the states will ultimately have to extend those rights to citizens of all the member states.

ii) By international custom, in the wording of The Hague Convention, we should interpret international customary law.

A first conclusion that should immediately be drawn from this rule is the acceptance that international customary law exists in matters of citizenship. In fact, one might be led to conclude that, according to the reserved domain principle, no international customary law should exist in matters of citizenship. If citizenship

were to be a purely internal concept it would be very hard to accept the formation of an international rule by reiteration, attached to the psychological element according to which the States believe the said rule to be mandatory.

Van Panhuys says that when referring to international customary law the *ius sanguinis* and *ius soli* rules were in the mind of the framers. In fact, the option of the States to draft an internal citizenship rule was balanced in a combination of the two factors. The author even questions whether this rule means that it is not legitimate for a State to introduce a new type of legislation, outside this combination.

This same author answers the question by saying that it would be admissible to introduce a new type of legislation. However, bearing in mind that Van Panhuys is interpreting The Hague Convention, drafted in the 30´s, and that his book dates back to the late 50´s, the mere fact that the answer appears speaks volumes. In fact, if this is not the case, what other international customary law should we consider other than the combination of these two principles? According to the same author, some countries represented at The Hague conference even proposed that "in issuing laws concerning nationality States must strictly adhere to the usual types"[133].

iii) When referring to principles of law generally recognized, the Convention used another general formula. According to Van Panhuys, attempts were made at the conference to "lay down in explicit terms the minimum conditions a proper nationality law must satisfy". It was clear that the conference was far from

[133] H. F. VAN PANHUYS, *The Rôle of Nationality in the International* (1959), 160.

reaching an agreement on such conditions and opted for a more general approach.

Nevertheless, it is important to remember that the conference agreed on both the existence of generally accepted principles of international law regarding citizenship and the theory that the principles should be a limit to the reserved domain principle.

Among these principles we could point out the genuine link, the prohibition regarding conferring nationality on those who do not desire it, the prohibition regarding retroactive application of constitutive citizenship rules and the general principle on the prohibition of arbitrary denationalization.

It is clear that, since The Hague Convention, regarding certain questions relating to the conflict of nationality laws in the 30´s the principle of the exclusive domestic domain in citizenship matters is not absolute. In fact, the exceptions and limitations set forth in the Convention on the State's sovereignty over citizenship are stronger and broader than some authors even recognize today.

It is also clear that these exceptions and limitations grew stronger in the international instruments approved afterwards.

## §3. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations on December 10, 1948, establishes the right to nationality, in Article 15, as follows: *"(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality*".

The exact extent of the right to nationality in the UDHR has been a source of controversy since the negotiation of the text inserted in the declaration.

In fact, according to the "travaux preparatoires" of the UDHR, it was not until the Third Committee that Article 15 became autonomous. In the initial draft, the right to a nationality was embodied in Article 13[134].

Article 13 established rules to avoid actions like those taken during the World War II by the Nazi regime when significant parts of the population were arbitrarily deprived of citizenship[135]. Also, Article 13 stated that no one should be forced to keep a citizenship against their will.

It was a long and turbulent path that led the negotiations to the text known today[136].

Following a French proposal, supported by Lebanon and Uruguay, Article 15 was introduced. In addition to the prohibition on the arbitrary deprivation of

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[134] INETE ZIEMELE and GUNNAR SCHRAM, Article 15 (1999), 300.

[135] MIRNA ADJAMI and JULIA HARRINGTON, The Scope and Content of Article 15 of the UDHR (2008), 96.

[136] JOHANNES MORSINK, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (1999), 80.

citizenship and to the right to change citizenship – rules that were somewhat consensual among State representatives – Article 15 included an enigmatic and very controversial right to citizenship. In fact, the idea of the right to citizenship as a human right was not consensual at all. The United States representative doubted that it would be possible to implement this right. The USSR representative maintained the classical view of citizenship according to which those matters should fall entirely within the domestic domain of the States[137].

This discussion was central throughout the debate about Article 15. As stated above, there was a fair consensus among States representatives about the other issues of Article 15. The main concern was the right to a nationality.

The main source of controversy was whether citizenship should become a fundamental international human right or whether it should continue to be included within the realm of State sovereignty.

At some point in the discussions, as the preparatory documents show, the US representative questioned the practical applicability of a right to citizenship. The question then was not so much about whether a right to citizenship actually existed – which some States were willing to accept – but rather how that right would be applicable in the international legal order.

It was quite clear when the provision was adopted – by a majority vote – that citizenship contained certain aspects of human rights but that States' visions on the content of this right varied immensely. This might help to explain why the right to citizenship has never been

[137] INETE ZIEMELE and GUNNAR SCHRAM, Article 15 (1999), 301.

properly explored in the international legal order and why its pace of development has always been so slow[138].

A first question that might be asked when interpreting this provision is: who is entitled to the right to citizenship?

The rights enshrined in the declaration are typically human rights in the sense that they are inherent to all human beings. The first word in the article indicates that very notion: *Everyone*.

This does not necessarily mean, though, that the right can be claimed by anyone. In fact two elements could lead to the interpretation that the article is only applicable to stateless people.

Firstly, the "travaux preparatoires" show that during the process of drafting the convention a great deal of concern was placed on the situation of stateless people.

Secondly, the wording "*everyone has the right to a nationality*" might lead the interpreter to conclude that the right is to have *one* citizenship and not a *certain* citizenship.

Seen from this perspective, the article's scope would be extremely narrow, but useful anyhow. It would mean that every human being would be entitled to have one citizenship, and that no one should be deemed stateless. Yet international law would go no further than that; it would stop when a person acquired a citizenship, regardless of what that was and its content.

Even if this interpretation seems reasonable and in accordance with later developments in the international law of citizenship, it is already revolutionary and

[138] INETE ZIEMELE and GUNNAR SCHRAM, Article 15 (1999), 302.

probably contradicts much of the scholarly doctrine produced about this topic, even nowadays.

In fact, the idea that a human being would be entitled to a citizenship, under certain circumstances – statelessness or any other –, directly contradicts the theory of the domestic reserved domain.

It is not just that international law poses limitations on State sovereignty over citizenship – which most of the scholars recognize – and that when those limitations are violated, other States can deny recognition of a State's decision to grant citizenship (negative limitations), but also that under certain circumstances a State should grant citizenship to a person (positive limitations).

The very recognition of the existence of positive limitations constitutes a significant step forward in the construction of the international law of citizenship that not every scholar recognizes yet today.

A first conclusion to be drawn from the interpretation of Article 15 is that it implies positive limitations on the States' decisions concerning citizenship.

However, the extent of these limitations is yet to be determined. As stated before, it is fairly consensual that Article 15 establishes a human right that can be claimed by stateless people, but it seems to be quite a narrow interpretation to say that a fundamental right provided in the Universal Declaration of Human Rights can only be claimed by those who were not awarded any citizenship at all.

A robust right to citizenship would be claimed by *everyone* and not only by the stateless. That would give substantive significance to such an enigmatic right. That would then mean that *everyone* has the right to citizenship – under criteria to be determined – and not

just the right to have *any* citizenship and just that first one.

The argument regarding the phrasing of the declaration cannot be deemed decisive. In fact, the right to "a nationality" does not necessarily mean the right to one or to the first citizenship.

Article 15 also states, in number 2, that no one should be denied the right to change nationality. It clearly shows that Article 15 is not concerned exclusively with the stateless. Only people that already have one nationality can logically change it.

It could be argued that Article 15, number one, concerns stateless people and number 2 is applicable to the rest. However, this would mean a restriction on the interpretation of the Declaration that cannot be supported by the exact phrasing or the "travaux preparatoires" and certainly not by the later developments in the international law of citizenship.

## §4. The Nottebohm decision and the genuine link theory

Commonly referred to in the citizenship literature as a historic decision, the Nottebohm case which came before the International Court of Justice indeed fixed the way citizenship is perceived in international law and helped to forge the opinion of scholars afterwards.

Nottebohm was born in Hamburg on September 16th, 1881. He was German by birth and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein. In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered. These activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed residence in Guatemala until 1943, that is to say, until the occurrence of the events which constitute the basis of the dispute[139].

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[139] Facts as described in the The Nottebohm Case (Liechtenstein v. Guatemala) International Court of Justice April 6, 1955 I.C.J. 4.

On October 9th, 1939, Nottebohm, who had been resident in Guatemala since 1905, applied for admission as a national of Liechtenstein.

According to the law of Liechtenstein, it was necessary to fulfill a three years' residence prerequisite to be able to obtain nationality. Nottebohm sought dispensation from the condition of three years' residence as prescribed by law, without indicating the special circumstances warranting such a waiver. He then paid substantial fees associated with the acquisition of nationality and waiver of the prerequisites.

Having obtained a Liechtenstein passport, Nottebohm returned to Guatemala at the beginning of 1940, where he resumed his former business activities.

Nottebohm was arrested on October 19th, 1943, by the Guatemalan authorities. He was turned over to the armed forces of the United States on the same day. Three days later he was deported to the United States and interned there for two years and three months.

In 1944 a series of fifty-seven legal proceedings was commenced against Nottebohm, designed to expropriate, without compensation to him, all of his properties, whether movable or immovable. Nottebohm was not permitted to return to Guatemala.

When he was released in the United States, in 1946 and wanted to return to Guatemala, he was refused admission. In 1946 he went to Liechtenstein where he fixed residence. In 1949, after living in Liechtenstein for three years, his properties in Guatemala were confiscated under Guatemalan law.

By application in December 1951, after living in Liechtenstein for five years, the Principality brought his case to the International Court of Justice against Guatemala. In the first phase of the judgment the Court

rejected the preliminary objection raised by Guatemala against the jurisdiction of the Court[140].

In the second phase, the Court addressed the more substantial issues.

The real issue before the Court was the admissibility of the claim of Liechtenstein in respect of Nottebohm. So the Court had to ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of naturalization could be validly invoked as against Guatemala, whether it bestowed upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala.

The Nottebohm case is a landmark in citizenship studies for several reasons.

It was the first time that the Court, after The Hague Convention and the UDHR, recognized the existence of real interactions between municipal and international citizenship law and the competence of the Court to resolve such disputes.

Some scholars analyze the case today by contextualizing its circumstances to diminish its impact and scope, or to say that it was a product of those specific circumstances[141].

When analyzing the Nottebohm case it should not be forgotten that it was produced in the aftermath of the Second World War, and that Nottebohm was persecuted for his alleged collaboration with the Nazi regime. It should also not be forgotten that when the case was decided he had been living in Liechtenstein for several

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[140] JOSEF L. KUNZ, The Nottebohm Judgement (1960), 536.

[141] ROBERT D. SLOANE, Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality (2009), 5.

years – more than those demanded by law – and that he ended up being a stateless person in the United States, after being stripped of the German citizenship and refused the protection of the citizenship of Liechtenstein.

All this being true, it is not so much the personal situation of Nottebohm that makes this decision historic but the legal conclusions it is possible to extract from it.

One of the major conclusions of the decision and the one that is still attached to the case today is the genuine link theory, also known as effective link.

The theory means that, despite being a municipal law competence, a State can disregard the attribution of citizenship by another State if it is proved that between the citizen and the State that granted citizenship and whose protection is claimed there is no effective link[142].

Of course this theory raises all sorts of difficult legal questions.

The first of these is the competence to define effective link. Here the Court, by accepting its competence to resolve the case and by denying the existence of an effective link in the case of Nottebohm, set the rule that another State can simply disregard the awarding of citizenship and that, in the case of a dispute, the ICJ would be competent to resolve this question.

Another relevant question is related with the criteria used to establish the effective link. According to the Court, "*nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the*

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[142] RUTH DONNER, *The regulation of nationality in international law* (1994), 59-64.

*existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national*".

It is true, as stressed by Josef Kunz, that the Court did not create the genuine link theory as a precondition for the validity of a nationality. In fact the decision was only vis-à-vis Guatemala in a functional approach to the dispute regarding Liechtenstein.

However, it is also true that the Court is bound by its own rules and procedures, according to which – Article 38 of the Statute of the ICJ – the Court must decide in accordance with international law such disputes as are submitted to it, and shall apply: a) international conventions; b) international custom; c) the general principles of law recognized by civilized nations and d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

So the application to the case of the genuine link theory means, at least, that the judges believed that in the context of the case the theory was applicable as one of the eligible sources of law.

It is not so important to determine whether the Court created the theory in the Nottebohm decision or whether it became binding afterwards.

The relevant conclusion from the decision is that the Court applied the theory as law and that, according

to the rules of its Statute, it ought to be classified as coming from an eligible source.

As stated in The Hague Convention, a citizenship law as defined by a State *shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.* The recognition by the Court that the decision of Guatemala to disregard the Liechtenstein attribution of citizenship to Nottebohm proved that the Court assumed the genuine link theory as a limit to the doctrine of the exclusive domestic jurisdiction. And the limit derives, as seems obvious, from the international law.

Yet this very recognition seems to have had limited effects in the way scholars analyze citizenship in international law. It was even recently classified as anachronistic in the light of other principles and developments under international law[143]. Notwithstanding the importance of other principles that have arisen in recent case decisions, especially from the European Court of Justice, such as the abuse-of-rights principle (and which was not absent in the Nottebohm decision), it seems that the full extent of the content of the genuine link theory was never truly recognized.

This plays a crucial role in clarifying the current meaning of the doctrine of exclusive domestic jurisdiction and the limitation to it from international law.

In fact, in a decisive work on citizenship and international law, Ian Brownlie advocates a general principle of effective nationality. He states that "*the evidence of practice both before and since Nottebohm, as well as the logical force of other principles of*

[143] ROBERT D. SLOANE, Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality (2009), 1.

*international law, justify the conclusion that the principle of effective nationality is a general principle of international law and should be recognized as such*"[144].

The total extent of this principle is yet to be developed. First and above all, it is necessary to determine its impact on the exclusive domestic jurisdiction doctrine that is still accepted today as an untouchable rule.

If the effective link is to be considered a general principle of citizenship law and if the principle constitutes a limit on States' decisions concerning citizenship and a limit to the exclusive domestic jurisdiction doctrine, it is very important to understand what this principle really means.

As defined in the Nottebohm decision, it means that the attribution of citizenship without an effective link can be disregarded by the States that would have to respect the municipal law attribution otherwise.

This view created the idea that the limits to the exclusive domestic jurisdiction doctrine were negative. The violation of international law limits would allow other States to ignore or disregard an internal decision by another State.

However, this conclusion is probably too narrow and too attached to the Nottebohm case. Some critics claim too much emphasis has been placed on the Nottebohm case and the effective link theory, and state that the case was too contextual and conditioned by the historical circumstances.

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[144] IAN BROWNLIE, The relations of nationality in public international law (1963), 364.

This criticism is right, but it does not necessarily lead to the conclusion that the theory should be ignored. On the contrary, being a product of a specific context but mirroring the existence of a broader principle, the utility of Nottebohm is to confirm the existence of such a principle.

It is certainly possible to affirm that the full extent of an effective link principle in international law implies a limitation on State sovereignty over citizenship not only in a negative way – as recognized in the Nottebohm case – but also in a positive way.

A consistent application of the principle demands a conclusion according to which those who find themselves in a situation of an effective link with a State should be awarded citizenship by that State.

It is not easy to establish solid criteria to determine what kind of link between a person and a State should be recognized as effective. Going back to the words of the Court in the Nottebohm case, "*nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*". How are these interests and sentiments expressed? How strong should the reciprocal rights and duties be?

When analyzing the Nottebohm case, several authors refer to the traditional criteria for attribution of citizenship: *ius soli* and *ius sanguinis*[145].

The two traditional criteria are considered as citizenship rules commonly adopted by States[146]. Not

[145] IAN BROWNLIE, The relations of nationality in public international law (1963), 302; ROBERT D. SLOANE, Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality (2009), 9; JOSEF L. KUNZ, The Nottebohm Judgement (1960), 553; J. MERVYN JONES, The Nottebohm Case (1956), 289.

being exclusive, it is fairly safe to conclude that a State that designs its naturalization rules around the two criteria is in accordance with the effective link theory.

Residence is a common way of acquiring citizenship by naturalization, also called derivative acquisition[147]. It seems then reasonably safe to affirm that someone who establishes a long term relationship with a State (land) by way of residence is considered to have an effective link with that State, according to international law. I will return to this issue in the last chapter.

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[146] IAN BROWNLIE, The relations of nationality in public international law (1963), 302.

[147] PAUL WEISS, *Nationality and statelessness in international law* (1979), 98.

## §5. Increasing interaction between national and international laws of citizenship

Although not at a pace that might be expected after the evolutions registered in international citizenship law in the aftermath of the Second World War, there is a clear trend towards increasing interaction between national and international laws of citizenship and towards a gradual recognition of an individual's right to citizenship[148].

A number of international conventions regarding nationality have been concluded.

The content of these conventions suggests the idea of increasing interaction between national and international citizenship laws.

### a) Convention on the Reduction of Statelessness

One of the international instruments regarding citizenship to be approved after the UDHR was the Convention on the Reduction of Statelessness, which occurred in New York on 30 August 1961.

Shortly before the proclamation of the UDHR, the Secretary General was asked by the Economic and Social Council to promote a study on statelessness by the Resolution 116D, in 1948[149]. The resolution requested the Secretary-General, in consultation with interested commissions and specialized agencies: (a) To

[148] JOANNES CHAN, The right to a nationality as a human right (1991), 13.

[149] JOANNES CHAN, The right to a nationality as a human right (1991), 3.

undertake a study of the existing situation in regard to the protection of stateless persons by the issuance of necessary documents and other measures, and to make recommendations to an early session of the Council on the interim measures which might be taken by the United Nations to further this object; (b) To undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject."

The Social Department of the Secretariat gave the term "stateless persons" a wider meaning by including in the study not only *de jure* stateless persons but also *de facto* stateless persons[150]. The study discusses these two categories of stateless persons. Stateless persons *de jure* are persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one. Stateless persons *de facto* are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals. Although in law the status of stateless persons *de facto* differs appreciably from that of stateless persons *de jure*, in practice it is similar[151].

The same study identified two main problems to be considered: the improvement of the status of stateless persons and the elimination of statelessness. However

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[150] PAUL WEISS, *Nationality and statelessness in international law* (1979), 168.
[151] *A Study on Statelessness* (1949).

necessary and urgent, the improvement of the status of the stateless person is only a temporary solution designed to attenuate the evils resulting from statelessness. The elimination of statelessness, on the contrary, would have the advantage of abolishing the evil itself, and is therefore the final goal[152].

The International Law Commission of the United Nations decided at its first session in 1949 to include citizenship and statelessness in the list of topics provisionally selected for codification[153].

Following this decision, the Secretary-General convened an international Conference of Plenipotentiaries for the conclusion of a Convention for the reduction or elimination of future statelessness. The Conference was held in Geneva from March 24 to April 18, 1959. The Conference reconvened in New York and, on August 28, 1961, adopted the Convention on the Reduction of Statelessness.

According to the Convention provisions, a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law.

A Contracting State shall also grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born because he has passed the age for lodging his application or has not fulfilled the required residence conditions, if the

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[152] *A Study on Statelessness* (1949).

[153] PAUL WEISS, *Nationality and statelessness in international law* (1979), 170.

nationality of one of his parents at the time of the person's birth was that of the Contracting State first above mentioned.

Even if the stateless person was not born in the territory of the Contracting State, he shall still be granted nationality by that State if the nationality of one of his parents at the time of the his birth was that of that State.

The Convention also establishes strict rules in terms of loss or deprivation of citizenship when such a decision might lead to the creation of a situation of statelessness.

It is very important to note, when analyzing this Convention, that, for the first time, an international legal instrument imposes specific conditions on States to award citizenship.

It is true that the Convention imposes duties on States and does not create individual rights. So it is not designed to award stateless people an individual right to citizenship. It is the States that are obliged to grant it.

Nevertheless it is a considerable step forward. Firstly, we should bear in mind that at that stage in its development international law did not recognize the individual as a subject of international law.

Nevertheless, it is significant that the Convention imposes duties on States to grant citizenship. The convention directly contradicts the exclusive domestic domain doctrine.

The contradiction is direct and evident. It is not even in line with the Nottebohm case. In Nottebohm the court recognized the existence of negative limits: a State could oppose another State's decision on citizenship when this decision violated international law. Here the limits are designed in a positive way: a State is obliged by international law to grant its

citizenship. Of course this obligation only affects Contracting States as it derives from an international convention, unless we are able to conclude that this principle has become international customary law.

In any event, it is possible to conclude that, according to international law, a State's sovereignty over citizenship is limited both in a negative and in a positive way[154]. This conclusion is very important for later developments in international citizenship law, even if, in the context of the Convention, we cannot grant individuals a right to citizenship – but merely create an obligation on the States to ensure their internal legislation complies with international law – and even if the Convention is still connected with the extreme situation of stateless people, which might lead to the wrongful conclusion that the fundamental right to citizenship is the exclusive preserve of the stateless.

Further developments will prove the contrary and will show the rise of an individual right to citizenship, not only of the stateless but of all foreigners effectively linked with a given State.

### b) The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was adopted on December 16, 1966. The main purpose of the Covenant was to implement some of the rights provided for in the UDHR. It became one of the core instruments of the UN international human rights body.

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[154] PAUL WEISS, *Nationality and statelessness in international law* (1979), 92-93.

The attention that the Convention dedicates to citizenship is surprisingly very limited. Article 24/3 establishes that every child has the right to acquire a nationality. The same right was later recognized in the Convention on the Rights of the Child of 1989.

It is nonetheless important to confirm the trend identified above. The Covenant recognizes that every child has a right to a nationality. It is not a general obligation imposed on Contracting States but a specific right that every child should be entitled to.

It can be said that little progress, if any, was made in relation to the UDHR. The Declaration already provided for a right to citizenship for everyone, not just children.

The explanation for this can be found in the Covenant's "travaux preparatoires". There was an agreement among States that every effort should be made to avoid statelessness among children. Some State representatives also argued that statelessness problems were not specific to children and that the Covenant should contain a general right to citizenship. Another opinion expressed was that naturalization should not be considered an individual right as it should be within State discretion. The Convention on Reduction of Statelessness was used as an excuse for the limited scope of the Covenant with regard to citizenship issues[155]. It does, however, protect children from being stateless in the territory of Contracting States.

[155] JOANNES CHAN, The right to a nationality as a human right (1991), 5.

### c) International Conventions on the Elimination of Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, and entered into force on 4 January 1969.

It is another important instrument that belongs to the core of the UN conventions on human rights.

Regarding citizenship, Article 5 provides that States Parties shall undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of, among others, the right to nationality.

It is noticeable that there is a slight wording difference between the way this right is phrased here and how it was phrased in the UDHR: not just the right to *a* nationality but the right *to* nationality.

It is worth noting that Article 1(3) establishes that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

In the "travaux preparatoires" of the Convention it was clear that a concern regarding the exclusive domestic jurisdiction doctrine was present here[156]. The first part of the provision expressly guarantees States sovereignty over naturalization and citizenship, but it adds a very important limitation: State provisions on

[156] INETE ZIEMELE and GUNNAR SCHRAM, Article 15 (1999), 311.

citizenship should not be discriminatory in terms of nationality.

This means that regardless of State sovereignty over citizenship, naturalization procedures must not be discriminatory in terms of national origin. A State cannot establish different naturalization criteria based on the nationality of those seeking naturalization.

This very important recognition adds a limit to those that it was already possible to identify according to The Hague Convention: Citizenship rules cannot be discriminatory in terms of nationality.

It also helps to interpret the existing international citizenship law. The right to citizenship, as many authors claimed before and after this convention, is not exclusive to stateless persons. It is not a right of the stateless alone. If this were the case, it would not make sense to affirm a general principle of non-discrimination in terms of nationality. By definition, stateless persons do not possess nationality. The provision – and all the others, including Article 15 of the UDHR – has to be interpreted in the sense that the right to citizenship is a general entitlement of everyone – stateless persons and citizens of other States.

The same principle of non-discrimination is present in the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981.

Article 9 provides that States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render

her stateless or force upon her the nationality of the husband.

The principle was already present in the Convention on the Nationality of Married Women, agreed in New York on 20 February 1957, which entered into force on 11 August 1958.

Article 1 states that Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.

Article 3 establishes that each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.

This constitutes another imposition on the States: a State should establish a special naturalization procedure for the naturalization of married women. Following a general principle of non-discrimination set forth in the Convention on the Elimination of All Forms of Discrimination, this obligation shall also apply when the husband claims the naturalization.

### d) Nationality of Natural Persons in relation to the Succession of States

Recent developments related to the nationality of natural persons in the succession of States are very relevant in terms of defining an international right to citizenship.

At its forty-fifth session, in 1993, the International Law Commission decided to include in its agenda the

topic entitled "State succession and its impact on the nationality of natural and legal persons". Václav Mikulka was appointed as a Special Rapporteur for that purpose.

In its resolution 50/45 entitled "Report of the International Law Commission on the work of its forty seventh session", the General Assembly noted, among other things, the beginning of the work on State succession and its impact on the nationality of natural and legal persons, and invited the Commission to continue its work on this topic. The Assembly also requested the Secretary-General to again invite Governments to submit relevant materials as soon as possible, including treaties, national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to this topic. By means of this resolution, the Commission received a clear instruction to complete the preliminary study on this subject.

In 1999, the Commission adopted the Draft Articles on Nationality of Natural Persons in relation to the Succession of States.

According to the Report drawn up by Mikulka, there was broad support in the Commission for the Special Rapporteur's contention that, while internal law essentially governed nationality, international law imposed certain restrictions on the freedom of action of States. It was generally agreed that it was precisely this limited role of international law in the specific context of State succession which was to be the focus of the Commission's work. The human rights aspect of the topic was particularly highlighted in this respect. It was strongly emphasized that the Commission's work on the topic should aim at the protection of the individual against any detrimental effects in the area of nationality

resulting from State succession, especially statelessness[157].

The Special Rapporteur's comments, in his first report, on the individual's right to a nationality gave rise to a debate within the Commission. Several members regarded the right to a nationality as central to the work. Special emphasis was placed on Article 15 of the UDHR. At the same time it was noted that the International Covenant on Civil and Political Rights reflected a reluctance to recognize that right as a general rule. As to the conclusions which the Commission should draw from the existence of the right to a nationality within the context of State succession, it was noted inter alia that the right implied a concomitant obligation on States to negotiate so that the persons concerned could acquire a nationality. The report also added that the right to a nationality, as a human right, is conceivable as a right of an individual vis-à-vis a certain State, deriving, under certain conditions, from international law[158].

In the Draft Articles proposed by the Commission, there is a general right to a nationality. Article 1 states that every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with those Articles.

It is worth noting that this right is not exclusive to stateless persons. Nothing in the provision requires a status of statelessness in order for the right to

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[157] *Second report on State succession and its impact on the nationality of natural and legal persons* (1996), 124.

[158] *Second report on State succession and its impact on the nationality of natural and legal persons* (1996), 124.

nationality to be recognized. This is especially evident in cases of dual nationality where one of them is of a third country not involved in the succession of States. In that case, a person, even if holding another citizenship, is still entitled to the citizenship that resulted from a succession of states.

This interpretation is clear even if read against Article 4 of the Draft Articles: States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession. This provision only makes sense if Article 1 is interpreted as applicable to everyone and not just stateless people.

Then, the Draft Articles establish very important rules in terms of effective link and residence, adopting a presumption of nationality in the following terms: persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Of course these Draft Articles are of limited scope. First of all, they were not adopted as a Convention nor opened for ratification. Then, the Draft Articles still imposed duties on States to adapt their legislation in a way which can be regarded as diminishing the strength of a fundamental right to citizenship.

However, more recently, in 2008, there was a resolution from the General Assembly, reiterating its invitation to Governments to take into account the Provisions of the Articles in dealing with issues of nationality of natural persons in relation to the succession of States. It also encouraged States to consider at the regional or sub regional levels, the elaboration of legal instruments regulating questions of nationality of natural persons in relation to the

succession of States, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of States. The same resolution invited Governments to submit comments concerning the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, including the avoidance of statelessness as a result of a succession of States.

It is certainly possible to conclude that States involved in a succession have the positive obligation to confer nationality on the individuals who possess genuine effective links to the territory in question. There is an emerging right to an effective nationality in the State with which an individual possesses genuine and effective links, at least in the context of state successions[159]. It is also clear that these principles are inquiringly general and indistinguishable. They are not exclusive to State successions but increasingly applicable in general international citizenship law[160].

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[159] JEFFREY BLACKMAN, State successions and statelessness (1997-1998), 1192.

[160] IAN BROWNLIE, The relations of nationality in public international law (1963), 319; JEFFREY BLACKMAN, State successions and statelessness (1997-1998), 1193.

## §6. Regional International Citizenship Law

### a) The Inter-American Instruments on Human Rights

The American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica, on 22 November 1969, which entered into force on 18 July 1978, contains a general right to citizenship[161].

According to Article 20, every person has the right to a nationality and to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. It also states that no one shall be arbitrarily deprived of his nationality or of the right to change it.

This general provision goes beyond the content of the UDHR, combining also what is established in the Convention on the Reduction of Statelessness.

The Inter-American Court of Human Rights issued a very important opinion in 1984 stating that "it is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which

[161] JOANNES CHAN, The right to a nationality as a human right (1991), 5.

state regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues"[162].

The opinion is very powerful and recognizes what no other court in the world had recognized before. It also gives great strength to the interpretation of Article 20 of the American Convention on Human Rights, since the Court has jurisdiction on the interpretation of the Convention.

More recently, the Inter-American Court of Human Rights issued another very important opinion on States' sovereignty to grant citizenship that combines the general principles of effective nationality, non-discrimination and protection against statelessness[163].

This opinion was issued in a case concerning the Yean and Bosico children[164]. In this case the Inter-American Commission on Human Rights submitted to the Court an application against the Dominican Republic. The Commission alleged that the State, through its Registry Office authorities, had refused to issue birth certificates for the Yean and Bosico

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[162] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC 4/84, Inter-American Court of Human Rights (IACrtHR) (1984).

[163] MIRNA ADJAMI and JULIA HARRINGTON, The Scope and Content of Article 15 of the UDHR (2008), 105.

[164] Dilcia Yean and Violeta Bosico v. Dominican Republic (Series C, No. 130, 7 Oct. 2005).

children, even though they were born within the State's territory and the Constitution of the Dominican Republic establishes the principle of *ius soli* to determine those who have a right to Dominican citizenship. The Commission indicated that the State obliged the alleged victims to endure a situation of continued illegality and social vulnerability, violations that are even more serious in the case of children, since the Dominican Republic denied the Yean and Bosico children their right to Dominican nationality and let them remain stateless persons until September 25, 2001. According to the Commission, the child Violeta Bosico was unable to attend school for one year owing to the lack of an identity document. The Commission requested the Court to order the State to grant reparations that would make full amends for the alleged violations of the children's rights. It also requested that the State adopt the legislative and other measures necessary to ensure respect for the rights embodied in the Convention and establish guidelines that contain reasonable requirements for the late registration of births and do not impose excessive or discriminatory obligations, so as to facilitate the registration of Dominican-Haitian children.

The court affirmed that "the determination of who has a right to be a national continues to fall within a State's domestic jurisdiction. However, its discretional authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States. Thus, at the current stage of the development of international human rights law, this authority of the States is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness. The Court considers that the peremptory

legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective. Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability"[165].

This opinion is very important as it summarizes the current trend in international law of increasing limits on and interaction with national law by international law. It also recognizes general principles of citizenship international law and impositions on States deriving from them.

[165] Dilcia Yean and Violeta Bosico v. Dominican Republic (Series C, No. 130, 7 Oct. 2005), parag. 140-42.

### b) The European Convention on Nationality

The Council of Europe has been concerned with issues relating to nationality for over thirty years.

The Parliamentary Assembly has adopted a number of recommendations concerning nationality, inviting member States to facilitate in particular the naturalization of refugees in their country. In 1988, it adopted Recommendation 1081 (1988) on problems of nationality in mixed marriages[166]. Therein, the Assembly noted that it was desirable for each of the spouses of a mixed marriage to have the right to acquire the nationality of the other without losing the nationality of origin; furthermore, children born from mixed marriages should also be entitled to acquire and keep the nationality of both of their parents.

In December 1992, the Committee of Experts on Multiple Nationality proposed the preparation of a feasibility study concerning a new, comprehensive convention which would contain modern solutions to issues relating to nationality suitable for all European States.

As a result of this work and the consultations of the Parliamentary Assembly, the text of the draft convention was finalized on 29 November 1996 and adopted by the Committee of Ministers on 14 May 1997. The Convention was opened for signature on 6 November 1997.

The Convention is the most comprehensive international text on citizenship and the one that

[166] JOANNES CHAN, The right to a nationality as a human right (1991), 7.

imposes the most intense obligations on Member States[167].

While reaffirming the exclusive domestic jurisdiction doctrine by stating that "each State shall determine under its own law who are its nationals", the Convention recognizes that internal citizenship law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.

After reaffirming the acquired principles of international law, such as non-discrimination of spouses, reduction of statelessness and effective nationality, the Convention accepts a principle that has arisen in international law in relation to the effective citizenship: the principle of residence.

The Convention establishes that each State Party shall provide in its internal law for the possibility of naturalization of persons lawfully and habitually resident in its territory. In establishing the conditions for naturalization, it shall not provide for a period of residence exceeding ten years before the lodging of an application.

This very provision constitutes a landmark in international citizenship law but is also recognition of the developments described above.

For the first time an international legal instrument imposes a positive obligation on States to grant citizenship based on residence. Residence is then considered a relevant element for naturalization, as an effective link for citizenship. Of course it is also

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[167] YAFFA ZILBERSHATS, *The human right to citizenship* (2002), 21.

connected with the traditional effective link element *ius soli*.

The Convention not only elects residence as an element of effective citizenship in order to impose a positive obligation on States, but even defines a length: not more than ten years.

One might ask what criteria were used to reach such a figure. A survey conducted in 2006 on European Union Member States' legislation on naturalization reveals that Member States require a minimum residence period of between three years (Belgium, for acquisition by naturalization) and ten years (Austria, Greece, Italy, Portugal[168] and Spain). Eight states require five years or fewer. In most countries, residence must have been legal and the applicant's place of habitual residence must have been in the State concerned. Generally, residence must have been uninterrupted immediately before the application[169].

The ten-year residence period is the maximum period for naturalization that can be found in European countries' naturalization laws. The Convention identified a trend and established a rule accordingly.

Since this was such a controversial issue, the Convention opted for a figure that was probably not the average but at the limit of what is considered the maximum lawful residence period before granting naturalization.

It can be concluded that the Convention imposed a positive obligation on Member States to grant citizenship to any lawful immigrant after ten years of

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[168] Portuguese law changed after the survey, reducing the residence period to six years.

[169] RAINER BAUBÖCK, EVA ERSBØLL, KEES GROENENDIJK and HARALD WALDRAUCH, *The Acquisition of Nationality in EU Member States: Rules, Practices and Quantitative Developments* (2006).

residence within its territory. Of course this is a maximum period, and each country is free to establish shorter periods.

Twenty countries have ratified the Convention so far.

It should be also noted that the rule only applies to persons lawfully and habitually resident in the territory. It excludes undocumented migrants.

## §7. The new international law of citizenship

Due to the intense activity around citizenship in international law, scholars speak now about a "new international law of citizenship"[170].

According to Spiro, "*even today, most leading commentators on citizenship theory—both legal scholars and social scientists—continue to characterize nationality practice as largely outside the ambit of international law*"[171].

Reality, as I have described above, largely contradicts this idea.

A first sign of a new international law of citizenship is a result of significant changes in the very structure of international law with special and deep consequences at the citizenship law level.

One of these changes has to do with a "human rights-oriented approach to nationality law"[172]. In this sense, as I will expand on in chapter 5, personhood has replaced citizenship as the criteria for the enjoyment of human rights. This universalistic approach to human rights also has to do with the renewed role of the individual as the subject of international law, an issue which I will also address in chapter 5.

As Spiro puts it, "*it is becoming increasingly clear that state discretion is no longer unfettered and that citizenship practice must account for the interests of*

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[170] The expression was eloquently phrased by PETER SPIRO, A new international law of citizenship (2011), 698.

[171] PETER SPIRO, A new international law of citizenship (2011), 716.

[172] KAY HAILBRONNER, Nationality in public international law and European law (2006).

*individuals as well as those of states*". And, he adds, that "*these developments depart from historical understandings of nationality practice. In contrast to earlier, minimal constraints on state practice, these prospective norms would mandate inclusive citizenship practices. That is, whereas earlier international law constrained states only by telling them whom they could not include as nationals (for example, barring them from extending citizenship to those with whom they have no connection), more recently evolving norms tell states whom they must include as citizens. The difference is radical. The old law of nationality, such as it existed, in no case dictated the adulteration of national community by directing the inclusion of individuals who would otherwise (as a matter of endogenous processes) be excluded. The old law of citizenship had almost nothing to say about birthright citizenship and naturalization. The new law of citizenship, by contrast, may dictate citizenship eligibility for habitual residents and their children*" [173].

This evolution described by Spiro is in fact radical. It largely relies on the renewed relevance of the individual in international law. From the international law of states we have moved to the international law of individuals.

For that matter, the old international law of citizenship was only concerned with the relations between States. A State could establish any rule on citizenship as long as it did not conflict with another State.

That is why early international citizenship law was basically aimed at avoiding conflict of laws, whether positive or negative.

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[173] PETER SPIRO, A new international law of citizenship (2011), 717-718.

In the framework of a new international law of individuals, this scenario dramatically changes.

First of all, citizenship is no longer the criteria for the enjoyment of human rights. Personhood plays that role. This means that citizenship is now less of a rights-based status but rather has become a political status. I will develop this idea in chapter 5.

This has paved the way for theories on the devaluation of citizenship.

Secondly, being centered on the human being, the new international law needs to be concerned with individual rights and aspirations.

In that sense, it is not so important that States are in agreement with each other about their internal definition of citizenship if the individual´s rights and aspirations are adequately taken care of.

Of course these two perspectives might be deemed as contradictory: if a person can enjoy human rights anywhere regardless of his citizenship status, why should his rights and aspirations get in the way and play a role in the definition of citizenship at the State level?

As I will develop in chapter 6, some fundamental principles make the case for a trend towards a general right to naturalization based on residence. The democratic principle is certainly one of them.

On the democratic principle and its relationship with the new international law of citizenship, Spiro says, "*the other driver here is a democracy norm. To the extent that self-governance constitutes a right, citizenship is centrally important. When citizenship—and with it, full equality—is denied to habitual residents, especially from birth or early childhood, democratic values are compromised. As Diane Orentlicher observes, "a democratic principles paradigm . . . presents an especially potent challenge to*

*the discretion that states have classically enjoyed in respect of citizenship policies*"[174].

In fact, as far as self-governance is concerned, some form of naturalization procedure ought to be established. Otherwise, permanent residents of a political community will be excluded from political participation.

As I stated above, political rights are among the few that can now be exclusively associated with the citizenship status – even if there are also trends to extend these to migrants, as I will analyze in chapter 5.

In any event, only full political status that is attached to citizenship can provide migrants with the kind of rights that will make them members of the political community as they should be when residing in a given country for a long period of time.

The nature of the democratic principle in international law can certainly be disputed. I will discuss this question thoroughly in chapter 6.

For now we can be sure that the full integration of a person in the political community is dependent on the attribution of the citizenship status and when a State refuses to do this, on an arbitrary basis, the new international law of citizenship plays a role.

In fact, it is fairly consensual that arbitrary practices or discriminatory rules on the attribution of citizenship, such as those based on race, ethnicity or gender, shall not be accepted in the context of international law.

If this is the case, the theory can be extended and a general criteria based on residence can be established, for reasons that I will develop later, according to which, with the support of international law, a State

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[174] PETER SPIRO, A new international law of citizenship (2011), 722.

ought to recognize the entitlement of a certain person to its citizenship.

At least a clear trend in that direction can be identified. As Spiro recognizes, "*with respect to the acquisition of citizenship, emerging norms point to limitations on threshold naturalization requirements for long-term residents, and the trajectory suggests a move toward the required adoption, at least in some contexts, of a jus soli basis for birthright citizenship. Both developments suggest that the balance is tipping toward a rights metric in how international law understands nationality questions. If so, international norms regarding nationality determinations are likely to harden in the medium to long term*"[175].

This trend is in nature revolutionary. It is not just that international law plays a role in national citizenship law. This assertion is becoming consensual, even if to very different extents.

The trend that is now identifiable points to a fundamental right to a specific citizenship that is recognizable regardless of the State's will, by determination of international law.

Such recognition is only possible in the context of a new international law of citizenship based on persons and not on States.

This is so because extending a right to a specific citizenship to a person without any State's dispute on that attribution must depart from a view that cares about the individual's rights and aspirations rather than the interests of States and of the international community.

That was certainly not the case of the broader interpretation of Article 15 of the UDHR. If interpreted

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[175] PETER SPIRO, A new international law of citizenship (2011), 720.

in the traditional way, as I have described above, it meant that all stateless persons had a right to a nationality. In that sense it is less of an individual right and more of another mechanism to avoid statelessness, which corresponds to a threat to the international law of nations.

According to this view, it is not so important that an individual person wishes to acquire a different citizenship. As long as the person possesses one, the right provided for in the UDHR should not be invoked.

This is clearly an interpretation anchored in the old-fashioned international law perspective, very much based on States. Why would the Universal Declaration provide for a human right that can only be exercised by the stateless? Why would the objective of such a right be the elimination of statelessness, a bold target of the international community? And even if the mentioned objective should not be neglected, why would the said individual right elude the protection of legitimate expectations of an individual that, regardless of possessing a prior citizenship, would like to acquire a different one in order to fully integrate in the community in which he resides?

This means that in the context of a new international law of citizenship, based on personhood rather than on States, Article 15 of the UDHR ought to be read in a different and modernized way, centered on individual rights, aspirations and legitimate expectations. The only way to do this is to recognize that it entails not only the right to possess one citizenship but also to possess the citizenship of one's choice.

Also, as I will discuss in chapter 6, Nottebohm and the genuine link theory might provide additional ammunition for this conclusion. Spiro underlines that "*the genuine-link test could be turned around to require*

*the extension of citizenship to individuals in the presence of such a link. The thresholds would differ. The link required to validate the extension of nationality is low, even under Nottebohm itself. When a state has refused nationality, the link required to compel its extension would be high. Underlying both is an assumption that nationality should comport with the social facts of community on the ground*".

This means that whenever the effective link exists, according to international law, citizenship should be granted. It is certainly the case of residence for a certain number of years. This idea, in conjunction with a renewed reading of Article 15 of the UDHR, helps to make the case for the trend I believe to have identified. In chapter 6 I will develop this idea, contrasting it with the *ius nexi* proposed by Ayelet Schachar[176].

A different issue is whether it also entails the right to retain the former citizenship, thus becoming a dual citizen. Spiro actually makes the case for dual citizenship as a human right[177].

The recognition of such a right largely relies on a transparent, equal and expedited naturalization procedure.

As Spiro notes, "*as a matter of practice, all states provide for the possibility of naturalization (that is, the acquisition of citizenship after birth). Availability of naturalization may now be required as a matter of international law. The 1997 European Convention on Nationality requires that states parties provide for "the possibility of naturalization of persons lawfully and habitually resident on its territory." Naturalization has become "more of a right than a favor." As the political*

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[176] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality,* (2009), 166.

[177] PETER J. SPIRO, Dual Citizenship as Human Right (2010).

*theorist Seyla Benhabib concludes in sketching a "human right to membership," it "would be objectionable from a moral point of view [not to provide] any procedure or possibility for foreigners and resident aliens to become citizens at all; that is, if naturalization were not permitted at all*"[178].

Again, the conclusion is somewhat revolutionary. According to this view, naturalization would not be a possibility rendered to States in their discretion to regulate citizenship; it would be an imposition of international law.

Despite the general trend that I have identified and will later develop, international law provides an undeniable example: the European Convention on Nationality, which I have briefly described above.

According to Hailbronner, "*the Universal Declaration of Human Rights states that everybody is entitled to a nationality. It has been rightly remarked that this provision does not indicate under which provisions a person is entitled to a specific nationality (...) This does not mean that a state's right to determine nationality law has remained unaffected by the development of human rights and human dignity, which has shifted the very foundation of public international law from a system of coordination of sovereign states to the well- being of human beings*". He adds that "*the right to a nationality as a human rights concept raises a number of issues with regard to the acquisition of nationality by second or third generation migrants*". As an example of this, he points that "*the European Convention on Nationality (ECN) provides that internal law shall contain rules which make it possible for foreigners lawfully and habitually resident in the territory of a state party to be naturalized. The*

[178] PETER SPIRO, A new international law of citizenship (2011), 723.

*maximum period of residence that can be required for naturalization is fixed at a maximum of ten years. This corresponds to a common standard in Europe, most countries requiring between five and ten years of residence*"[179].

Even if the acknowledgment of the emergence of a new international law of citizenship is not evident, signs of change are becoming very clear.

It might be harder to affirm a general right to naturalization – although I do acknowledge the existence of a trend towards such a right – but it is very clear that such an imposition on States is becoming a matter of international law, at least in international treaties.

As I have described above, the ECN is the first international instrument to establish such an imposition. As De Groot notes, "*for the first time an international treaty attempts to indicate which grounds for acquisition and loss of nationality are acceptable*"[180].

First, as Hailbronner notes, "*chapter 2 of the European Convention describing the general principles relating to nationality therefore very cautiously states that the rules on nationality of each state party shall be based on the following principles:*

– *Everyone has the right to nationality,*

– *Statelessness shall be avoided,*

– *No-one shall be arbitrarily deprived of his or her nationality,*

– *Neither marriage nor the dissolution of a marriage between a national of a state party*

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[179] KAY HAILBRONNER, Nationality in public international law and European law (2006), 37-38.

[180] GERARD RENÉ DE GROOT, The European Convention on Nationality: a step towards a ius commune in the field of nationality law (2000), 129.

> *and an alien, nor a change in nationality by one of the spouses during the marriage shall automatically affect the nationality of the other spouse*"[181].

Although the Convention is not innovative in terms of the general principles of international law of citizenship, the mere fact that an international convention lays down those principles is relevant. It means, in a way, a compilation or condensation of general principles of international citizenship law.

Then, to test the relevance of the ECN, it can be said that it is regional. Although this is the case, it cannot be limited to the EU or even to the geographical space of Europe. This is not to say that the EU citizenship experience is less relevant. On the contrary, it has brought an enormous input to the international law of citizenship, as I will expand on in chapter 4. In fact, and this explains why I included the ECN in this chapter, this Convention is not merely European. As Spiro recalls, it "*is open for accession not only by members of the Council of Europe, but also those states who "participated" in the Convention's "elaboration," including Bosnia and Herzegovina, Canada, Kyrgyzstan, and the United States*"[182].

Also, the ECN represents, to a certain extent, a general codification of citizenship law in international law. As De Groot says, "*the main importance of the ECN is that obligations and ideas that have emerged as a result of developments in both international and domestic law have gradually been consolidated into a single text. Most provisions of the Convention were*

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[181] KAY HAILBRONNER, Nationality in public international law and European law (2006), 53.

[182] PETER SPIRO, A new international law of citizenship (2011), 718 (note).

*inspired by provisions of a considerable number of other international instruments. The nationality provisions of these instruments have been adopted in the ECN, in some instances in a slightly elaborated form. Moreover, a number of provisions included in the Convention aim to contribute to the progressive development of an international law on nationality. This applies in particular to the provisions in Chapter VI on State succession and nationality*"[183].

A crucial aspect of the Convention to my general thesis is the obligation imposed on Member States to naturalize those lawfully and habitually resident in their territories, as established in Article 6(3). The article also states that "*in establishing the conditions for naturalization, it shall not provide for a period of residence exceeding ten years before the lodging of an application*".

Thus the ECN imposes a duty on States to naturalize and, in a way, grants a right to naturalization to lawful and habitual residents. The Convention considers habitual residence a period that shall not exceed ten years.

As Michel Autem underlines in a report about the ECN, "*it promotes the idea that voluntary residence on a state's territory gives individuals rights which they may rely on in order to acquire that state's nationality (...) In this way, lawful and habitual residence is no longer considered as one of the conditions that has to be fulfilled for acquiring the nationality of a State Party, but almost as a ground for becoming entitled to the right to acquire that nationality. The importance attached to the notion of residence is such that, in cases of state succession, it appears to form the basis*

[183] GERARD RENÉ DE GROOT, Towards a European Nationality Law (2004), 27.

*of a "right to remain" for non-nationals residing on a territory whose sovereignty has been transferred and on which they were residing previously (Article 20-1a)*"[184].

Several qualifications must be made while analyzing the ECN, in particular the naturalization clause.

Firstly, it is clear that the Convention is not a general international law instrument as it is not opened to ratification by all the members of the international community, but it is far from being a regional instrument limited to a reduced number of States. It goes far beyond the members of the European Union and that is why I do not include it within the analysis of EU citizenship.

Secondly, as Autem reveals and as I have underlined above, the drafters conceived the Convention as a codification of international citizenship law. In that sense it is much more representative than the list of ratifications may imply. It is an international instrument aiming to depict the status of international law of citizenship at a given moment, regardless of which States can or will ratify it.

Also, it must be carefully read. It imposes an obligation on States to naturalize lawful and habitual residents. It is not a mere option of the States. The wording "*shall provide*" indicates a clear obligation.

Whether or not this obligation is self-executing is debatable. As I transcribed above, authors read here a right to naturalization. The ability to exercise such a right is not evident. However, it is very clear that a direct obligation to naturalize lawful and habitual residents derives from the Convention and that where

[184] MICHEL AUTEM, The European Convention on Nationality: is a European Code on Nationality possible? (1999), 32.

Members States fail to do so they will incur international liability for breaching obligations in an international treaty according to the principle *pacta sunt servanda*.

For my general thesis, especially from a transnational law standpoint, the discussion about the self-executing nature of the Convention is not so important. The fact is that an international treaty, furthermore one which the drafters intended to be a general codification of international citizenship law, provides for an obligation or imposition on States to naturalize. This is of course revolutionary. It represents a bold break with the traditional ideal that citizenship is in the realm of State sovereignty and the responsibility for defining it lies essentially with States.

As I have outlined, the reserved domain doctrine suffered a significant evolution over time and several exceptions were considered. However, until the ECN, none of these exceptions provided directly for an imposition to grant citizenship. Several negative limitations were considered, especially after the effective link doctrine elaborated in Nottebohm. Yet, these limitations always concerned the ability of a State to refuse recognition of citizenship of another State based on certain conditions enshrined in international law. Never before in a crystal clear fashion had any instrument of international law provided for such a bold imposition, in a positive way.

This opens the door, obviously, to different approaches and theories, relying on the existence of positive limitations in international law of citizenship, such as the trend that I generally identify. It cannot be said, in the light of this Convention, that international law does not impose any obligation on States regarding the attribution of citizenship.

Another very important aspect of this rule that strengthens my interpretation is the identification of a timeframe for establishing habitual residence. According to the Convention this period shall not exceed 10 years.

As I have stated above and will expand on in chapter 6, this period of 10 years results from several studies and surveys in Europe and elsewhere regarding the standard residence prerequisite for naturalization. According to these surveys, 10 years would not be the standard but the maximum residence period for naturalization. That is why the Convention establishes this limit as a ceiling, allowing States to establish shorter periods.

In any event, this limit certainly eliminates the possibility of Member States maintaining or raising existing prerequisites that do not comply with this ceiling. Again, from a transnational law standpoint, the rule is of utmost importance due to what it reveals. A general principle may be identified as an obligation of any State to naturalize residents after a reasonable period of residence, this period not being longer than 10 years. This is absolutely crucial for my general thesis and sustains very solidly the idea of a general trend towards the right to naturalize in the country of residence.

A final qualification must be made. The Convention imposes the obligation to naturalize lawful and habitual residents. Although absolutely clear about the "habitual" portion of the rule, even adding a number to it, the Convention does not clarify what it means by lawful.

First of all it is necessary to discover according to which law the lawful residence must be assessed: national or international?

Of course it can be said that the lawfulness of residence is always assessed according to national law because the exclusive domestic jurisdiction also applies to immigration law.

However, it is also clear that this power is not unlimited. International law may not rely entirely on States regarding the lawfulness (or unlawfulness) of a residence status, since this may be the result of a discriminatory provision (based on suspect categories for international law, such as gender or race).

The intent of the provision is clear: the obligation to naturalize should not include naturalization of undocumented migrants.

The specific situation of this category of migrants and the controversy it generates every time their rights and duties are discussed in international law is always a matter of debate, as I will show in chapter 5.

It is no surprise that such a qualification had to be made in the text of the Convention or otherwise it would be deemed as unacceptable by many States and that would compromise the very goal of the Convention as a whole.

This does not mean, however, that the obligation to naturalize and the corresponding right are limited to documented migrants. It is significant that the drafters did not use the phrasing documented/undocumented, or even worse, legal/illegal but used the phrasing lawful/unlawful residence.

This means that the judgment about the legality must be made on the residence status and not on the person himself. I will return to this issue in chapter 5.

I also interpret it as locating, at least in part, in international law the assessment of that legality. For the reasons I have set out, it cannot be totally dependent on the national decision.

Finally, this opens room for a discussion that must go beyond the specifics of this Convention and must consider other elements, especially those generated after it was drafted, on whether or not a human right to nationality that entails a right to be naturalized in the country of residence should include those admitted in that country in violation of national immigration laws and thus being considered undocumented. I will return to this in chapter 6.

## III – Transnational citizenship

### §1. Citizenship elements and their transnationalization

It is impossible to conduct a study on citizenship nowadays without addressing the critical question of transnational citizenship. It is clear that a narrow and monochromatic vision of citizenship centered on the State, defined by reference to a territory with its established borders and resulting from a perfect coincidence between *etnos* and *demos* is long gone. Thus scholars have increasingly invoked the concept of "transnational citizenship", a term I use to denote a citizenship that is not tethered to the State.

Many factors may have contributed to the pulverization of the basic elements of citizenship. One of them is the affirmation of the individual as a subject of international law.

Also the growing importance of transnational associations of States, regional organizations, international organizations, NGO's and other forms of transnational involvement has contributed to the emergence of a form of citizenship beyond the State's borders. Some scholars refer to the concept of transnational citizenship, post-national citizenship and global citizenship. These different formulas try o capture an expression that best describes the phenomena of membership decentered from the State[185].

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[185] YASMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994); LINDA BOSNIAK, Denationalizing citizenship (2001); Id., Multiple Nationality and the Postnational Transformation of Citizenship (2003); DAVID JACOBSON, *Rights across*

Territorial integrity has been challenged by the massive migratory movements that cannot even be stopped by States' regulations and law enforcement. National sovereignty has been ineffective in stopping that movement and illegal migration somehow substitutes the internal admission process.

On the other hand, international protection of human rights, especially in the second half of the 20th Century, contributed to blurring the differences between citizens and foreigners. By recognizing a significant number of rights to every human being – in direct connection to personhood – it was no longer possible for national legislation to discriminate against foreigners in the protection of basic human rights.

As Linda Bosniak points out, the following elements can be devised within the citizenship concept[186]:

1. Citizenship as legal status
2. Citizenship as rights
3. Citizenship as political activity
4. Citizenship as identity/solidarity

Citizenship as a legal status results from the ancient Greek and Roman heritage and corresponds to a formal tie of belonging to a legally organized community. It entails the classic notion of citizenship as the link between the individual and the State. In fact one can consider transnational citizenship from an institutional standpoint or just as an isolated movement of diffusion of the elements which constitute citizenship. The first dimension is less frequent. It is

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*borders: Immigration and the decline of citizenship* (1996); RAINER BAUBÖCK, *Transnational Citizenship* (1994).

[186] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 19-20. For a thorough analysis of these elements, see LINDA BOSNIAK, Citizenship Denationalized (2000).

difficult to support an institutional transnational citizenship unless we advocate the creation of a Global State in which this citizenship could be regulated. On the contrary, the idea of transnational citizenship has little connection with institutionalization for it resulted from recognition of the failure of States to regulate citizenship and the weakness of States' borders in controlling it.

European citizenship is, however, an exception to this general idea. European citizenship represents the best, if not the only, example of an institutional transnational citizenship. It contains the most relevant citizenship elements and aspires to include them all[187]. I will discuss this idea later in the chapter on European citizenship.

The concept of citizenship perceived as a group of rights results from sociological approaches to citizenship regarding the rights that it brings with it, and corresponds to the vision of T. H. Marshall[188] or the right to have rights discussed by Hannah Arendt[189]. Despite these theories, we should acknowledge the scarcity of citizenship rights today, since the majority of human rights are protected in relation to every human being regardless of his citizenship.

Citizenship as political activity results from a concept shaped by Hannah Arendt according to which the basic content of citizenship is the ability it conveys on its holders to participate actively in and shape the political community. In this sense citizenship means any type of community engagement and political

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[187] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 19.

[188] T. H. MARSHALL, *Citizenship and Social Class and Other Essays* (1950).

[189] HANNAH ARENDT, *The Origins of Totalitarianism* (1985).

participation, regardless of the formal status of the individual or even of the locus of that participation.

Citizenship can also be seen as an element of identity. Sometimes that identity results from natural factors as a consequence of restrictive or ethnocentric policies of attributing citizenship, but often it also results from an intentional creation of communities. In the latter cases citizenship is the glue that keeps the community united.

## §2. Moral, philosophical and economic justification for the transnational citizenship

Among the dimensions of moral and philosophical justification for citizenship, perhaps the more relevant are[190]:

a. Moral cosmopolitanism (Joseph Carens[191], Matha Nussbaum[192])
b. Deterriatorialized or post-national citizenship (Rosenau[193], Soysal[194])
c. The decline of citizenship (Walzer[195], Jacobson[196])

### a) Moral Cosmopolitanism

The idea of moral cosmopolitanism originates in the Kantian cosmopolitan legacy and its right to

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[190] For a thorough analysis of these theories, see SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 94; Id., Transformation of citizenship: The case of contemporary Europe (2002), 37.

[191] JOSEPH H. CARENS, Aliens and Citizens: The Case for Open Borders (1987), 251-273.

[192] MARTHA NUSSBAUM, Patriotism and Cosmopolitanism (1996), 3.

[193] JAMES ROSENAU, *Along the domestic-foreign frontier: exploring governance in a turbulent world* (1997).

[194] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994).

[195] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983).

[196] DAVID JACOBSON, *Rights across border: Immigration and the decline of citizenship* (1996).

hospitality[197]. The right to hospitality entails the possibility of entering and being welcomed in the territory of any State for all migrants, especially those with special needs or facing difficulties or persecutions in their home countries. This right to hospitality also entails a guarantee that the host State will not deport the migrants whenever their return to the home country represents a special sacrifice[198].

This idea represents the very basis for what would later become the refugee law and its main principle of *non refoulement* that prevents a refugee's deportation to the State of origin once he has been admitted and his status officially recognized, .

More recent readings of the moral cosmopolitanism theory advocate the abolition of borders. The attribution of rights based on the mere fact that someone was born in a given territory or on blood line is as arbitrary as the attribution of rights based on race, color or gender.

This trend can be associated with a broader movement that has been advocating "open borders".

According to Joseph Carens, citizenship in liberal democracies is the contemporary equivalent of feudal privileges. Being an inherited status, it contributes decisively to the personal success of its holders. The author recognizes the sovereignty argument according to which the citizens of a State can establish their own criteria of admission of foreigners and also the incorporation of foreigners in their internal polity by approving their own immigration and citizenship laws. A parallel can be drawn with a property right, as if this

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[197] IMMANUEL KANT, *Perpetual Peace* (2010 [1795]); SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 40.

[198] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 28.

were a collective property right over the territory, legitimizing the decisions of its citizens to exclude foreigners[199]. The problem for Carens is that the answer relies on a conception of collective property and not of private property, contrary to the liberal tradition.

Carens refers to the conceptions of Nozick, Rawls and Walzer which support, in different fashions, border controls and the State's right to control immigration. Carens opposes the main arguments for supporting border controls.

Firstly, for Carens those who approve immigration and citizenship laws – the citizens in a democratic society – do not find themselves in a legitimate position since their power results from an arbitrary attribution based on criteria such as place of birth or lineage.

Secondly, Carens attempts to deny the economic argument according to which immigration brings about a reduction in the citizens' well-being. According to Carens this consequence of the migratory movements is yet to be confirmed. Even if such an argument could be confirmed it would be necessary, from a liberal democracy standpoint based on human dignity, for the citizens' sacrifice to be greater than the sacrifice imposed on the migrant that is prevented from entering the State's territory.

Lastly, the argument according to which immigration endangers the culture of the host State is irrelevant for Carens because even if it was true it would not violate the basic principles of a democratic society[200].

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[199] For an approach to citizenship and property law see AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009).

[200] JOSEPH H. CARENS, Aliens and Citizens: The Case for Open Borders (1987), 251-271.

Although Caren uses compelling arguments, the case for open borders which he presents brings up various problems. In particular it ignores the serious difficulties in controlling migratory movements.

A unilateral decision of one State to open its borders would lead to chaos in that very State, unless the same decision was taken at the same time by all the other countries in the world. In order to avoid the chaos of a world without borders, an open borders policy would require a world authority that would be able to regulate migratory movements. A State that chooses to implement an open border policy would be isolated in the context of the international community and would immediately be flooded by all sorts of migratory movements. Chaos would follow.

Nevertheless, the case for open borders is an excellent intellectual exercise to challenge set ideas on immigration and on State sovereignty over migration and citizenship. A very important point Carens makes is the challenge to the citizens' legitimacy to restrictively legislate on the admission of citizens. Of course that also has significant implications regarding the decision to grant citizenship. The right to citizenship that Carens claims depends only on the migrant's decision[201]. In a way it is close to Walzer's position when he claims that a State that pushes its workers away from citizenship is in fact a tyranny[202].

The open borders theory, if combined with the right to citizenship, leads to loss of a State's control over its population, transferring from the citizens to the migrant the decision on the acquisition of citizenship. Carens

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[201] JOSEPH H. CARENS, Aliens and Citizens: The Case for Open Borders (1987), 345.

[202] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 52.

attempts to avoid this criticism by saying that according to his theory the distinction between foreigners and citizens should be maintained. Foreigners should be allowed to adhere to the social contract and become full members of the community once the basic conditions of the said contract are fulfilled.

Responding to Noah Pickus on naturalization policies, Carens says that the requirements for naturalization should be set very low. He continues: "*Nevertheless, I want to argue that, as a matter of fundamental justice, anyone who has resided lawfully in a liberal democratic state for an extended period of time (e.g., five years or more) ought to be entitled to become a citizen if he or she wishes to do so*"[203].

Although I could entirely subscribe to the latter affirmation, the combination of the open borders theory with the right to citizenship after a period of residence is problematic and could ultimately contribute to the reverse effect Carens aims to achieve. If the borders are opened and migration is a free decision and if after entering the territory migrants will receive citizenship after a certain period of time in residence, it is highly probable that States will either try to control migration or citizenship. Such a policy might lead to the reverse effect and result in States tightening policies towards migration and using all their power to prevent migrants from even getting close to their borders.

On the contrary – as I will show in later chapters – I argue that the decision whether to admit a migrant to a State's territory should be a free decision of that State – so that there are few or no expectations raised for the migrant and no right to democratic participation – but the decision to extend citizenship should be a much

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[203] JOSEPH CARENS, Why naturalization should be easy: a response to Noah Pickus (1998), 142-143.

more restricted one, in line with the arguments used by Carens in his response to Pickus. I will return to this issue later.

When Carens refers to the idea of a social contract between the migrant and the State it can be linked to the theory of immigration by contract that can be used to oppose the right to citizenship. According to this theory, the immigration rules are laid down in the contract between the State and the migrant. As long as the basic conditions of that contract are met there is no reason to dispute its internal fairness. The problem is that migrants not have extremely limited bargaining power– as Motomura acknowledges – but they also cannot claim a right to citizenship because that right was not part of the contract when they decided to migrate to a certain country and they have tacitly accepted that contract. In other words – and I will come back to this later – the expectations of the migrants after living for a certain period in the country could not be used as an argument to sustain the right to citizenship because that right was not inscribed in the contract that they tacitly concluded while crossing the State's borders[204].

Transferring the decision power over the attribution of citizenship from citizens to the migrants is also problematic, even from the democratic standpoint. It means transferring a decision from a larger group of people with diverse and convergent interests to the decision of one single person that is directly interested. From the Rawls concept of justice, the "veil of ignorance" can only be used by citizens since the migrant can never put himself in such an impartial situation.

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[204] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 10.

The moral cosmopolitanism theory can also be found in the thought of Martha Nussbaum[205]. Nussbaum sees cosmopolitanism as a way of bringing people together, for greater mutual understanding. For Nussbaum, this would have been the only way to prevent tragic events in human history that were caused by rage, such as Nazism or, more recently, Islamic terrorism.

Cosmopolitanism trends can also be sustained from an economic standpoint. The open borders case can have an economic approach. Recent studies have demonstrated that migration produces a very positive impact on the host countries' economies. The decision to migrate is often associated with the search for better living and working conditions that migrants hope to find in the host countries. When that expectation is fulfilled, migrant workers will be adding value and contributing to improving the economy. The direct effect of that value added is produced in the migrant's personal financial situation and quality of life. Yet the benefits for both the host and the home country are also significant. The economy of the host country benefits from additional workforce, often at a cost which is lower than that of the national work force. There will also be benefits for consumers since the migrants will be part of the national market. The home countries benefit from remittances of their migrants that hugely contribute to the development of the economies and in many cases constitute one of the main sources of income. I will return to these issues later in the chapter about migrant workers as citizens in waiting.

These conclusions are far from being consensual and the economic effects of migration have been at the center of recent political and social debate. Many

[205] MARTHA NUSSBAUM, Patriotism and Cosmopolitanism (1996), 3.

challenge the positive effects and argue that the positive economic effect is only felt by the richer classes of the host country, which are able to benefit from cheaper basic services and able to enjoy extra resources in other activities. That is the case when the jobs for which citizens and migrants are competing are low income ones aimed at less qualified people. This means that immigration would lead to unemployment for poorer citizens and economic benefits for richer citizens. A classic example is that of a restaurant that hires immigrants and can therefore serve cheaper meals to its customers – typically the higher classes – while the lower class citizens, those looking for a job at the restaurant, would find themselves in a difficult situation, having to choose between unemployment or working for a substantially reduced salary, equivalent to what is paid to the immigrant[206].

However, as Chang demonstrates, this idea is based on incorrect assumptions. Firstly it would be necessary to assume that immigrants and citizens compete for the same jobs. This assumption is not correct since it is clear that in modern Western societies there are many jobs that the citizens are not willing to do. Secondly the argument rests on the presumption that the beneficial effect of the immigration can be limited to the higher classes. Even if the direct effect could only be felt by these privileged classes – the usual clients of restaurants or taxi cab owners –the positive effect would rapidly spread to the whole community as the extra resources that would result for the higher classes would be used in other consumption that would ultimately benefit everyone. Going back to the

[206] The example is adapted from the one used by HOWARD F. CHANG, Economic Impact of International Labor Migration: Recent Estimates and Policy (2006-2007), 328.

restaurant example used by Chang, the competition between migrants and citizens is not at the same level. The owners of the restaurants prefer to hire citizens as waiters – maybe for the language skills – and migrants to work in the kitchen – if this option proves to be economically more profitable because migrants will take less pay than citizens. In this case restaurant owners would be able to serve cheaper meals and maintain the profit margin. With cheaper meals clients could go to restaurants more often. The profit growth could lead the restaurant owner to expand his business[207]. This movement would have a very positive economic impact on the real economy as a whole, creating more jobs for migrants and for citizens[208].

Admittedly, the arguments associated with economic cosmopolitanism may not be applicable to the moment of attribution of citizenship to the migrants. Some of the identified economic advantages might be lost once the migrant acquires citizenship of the host country.

Nevertheless, the various cosmopolitan theories which favor the elimination of border controls, although controversial, highlight the relationship between migration and citizenship. It is not possible today to discuss the migratory movements without seriously pondering the consequences of those movements and of the rules created to control them by the design of the host country *demos*. The cosmopolitan views also have

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[207] HOWARD F. CHANG, Economic Impact of International Labor Migration: Recent Estimates and Policy (2006-2007), 330.

[208] The controversy about the economic effects of migration in times of financial and economic crisis is especially critical. When unemployment rises migrant workers are especially vulnerable towards the restrictive immigration ideas. It is particularly important at such a time to bear in mind the moral, philosophical and economic justification for transnational citizenship.

to be addressed– and their theorists do not ignore this – bearing in mind that the migrant might, down the road, acquire the host country citizenship given that the host should not permanently deny citizenship to those who participate in building the community.

**b) Deterritorialized or post-national citizenship**

The theory of a deterritorialized or post national citizenship looks at the porous nature of borders as a sign of a new global order and the waning of the nation-state. Universal human rights protection is also a sign of those changes[209].

As Rosenau points out, citizenship was conceived as a narrower concept of attachment, but more recently it has gained broader meanings. According to Rosenau, the sources of transformation have been many, ranging from the civic abilities of individuals to the devaluation of citizenship, the State and a promise of universal personhood. Rosenau also identifies the erosion of citizenship as a consequence of cross border migration and the blurring of the differences between citizens and aliens[210]. Yet Rosenau acknowledges new types of attachments, either with transnational origins or with social movements, or even with sub national collectivities[211]. Thus it seems that Rosenau is advocating a relocation of citizenship beyond the States' porous borders and within the new center of attachments location.

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[209] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 173-174.

[210] JAMES ROSENAU, *Along the domestic-foreign frontier: exploring governance in a turbulent world* (1997), 277-278.

[211] JAMES ROSENAU, *Along the domestic-foreign frontier: exploring governance in a turbulent world* (1997), 286.

For Soysal "*in the post-national model, universal personhood replaces nationhood and universal human rights replace national rights. The justification for the state's obligations to foreign populations goes beyond the nation-state itself. The rights and claims of individuals are legitimized by ideologies grounded in a transnational community, through international codes, conventions and laws on human rights, independent of their citizenship in a nation state. Hence the individual transcends the citizen. This is the most elemental way that the post-national model differs from the national model*"[212].

Soysal goes on to use the example of the international conventions on refugee law to illustrate that in cases of political persecution personhood replaces citizenship in the sense that the rights of the refugee are protected by the host country that cannot even deport to the home country a person whose refugee status has been recognized.

Soysal identifies three major developments that explain the post-national citizenship movement. Firstly, in the post war period the nation-state as a formal organization was decoupled from the locus of legitimacy and shifted to the global level. "*In this new order of sovereignty, the larger system assumes the role of defining rules and principles, charging the nation-states with the responsibility to uphold them*"[213]. The second development is "*the emergence of universal rules and conceptions regarding the rights of the individual, which are formalized and legitimated by a multitude of international codes and laws. International*

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[212] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994), 142.

[213] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994), 144.

*conventions and charters ascribe universal rights to persons regardless of their membership status in the nation-state (...) both the Universal Declaration of Human Rights and the European Convention have been incorporated into the constitutions and laws of many countries*"[214]. The third development is the previously mentioned international protection of refugees and the principle of *non refoulement*.

Soysal considers EU law as the best example of post-national citizenship and of the decoupling of rights from the nation-state to the international arena[215].

Despite advocating the idea of post-national citizenship, Soysal does not sustain the duality of the world citizen vs. local citizen or the idea of creating a world state. For Soysal post-national formations of membership do challenge set ideas and show that national citizenship is no longer an adequate concept but she acknowledges that the domestic *locus* still plays an important role[216].

Post-national theories are very important in understanding the signs of citizenship denationalization. However, in my view they fail in two aspects.

Firstly, the focus of the analysis is still territorial. The idea is that the national was replaced by supranational. But then the new *locus* is hard to find. That is probably why Soysal refuses to acknowledge the end of the nation-state and struggles to find its new

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[214] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994), 145.

[215] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994), 147; LINDA BOSNIAK, Citizenship Denationalized (1999-2000), 459.

[216] YASEMIN SOYSAL, *Limits of citizenship: migrants and postnational membership in Europe* (1994), 166-167.

positioning in the global order. The answer to this difficulty would be to advocate the creation of a global state which is not a concern of the post-national theorists.

Secondly, most of the arguments used by the post-national theorists are rights-related. Thus, post-national theory relies largely on an update of citizenship as rights theory at the supranational level. Notwithstanding the importance of the citizenship as rights theory, it fails to analyze and understand other features of the rich and multifaceted citizenship concept.

### c) The decline of citizenship

The decline of citizenship theory departs from the critique on cosmopolitanism to consider that the waning of the nation-state as a consequence of globalization and the international protection of human rights results in the devaluation of citizenship[217].

Walzer rejects the open borders theory. Political communities should be free to establish the first entry policy, whether concerning migrants or refugees. For Walzer, as long as the country complies with its international obligations and with the mutual aid principle, it is free to admit or refuse entrance of foreigners within its borders[218]. However, once admitted in the territory, individuals cannot remain foreigners forever and must be naturalized. As Benhabib underlines, "*the basis for this claim is unclear; there*

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[217] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 115-116.

[218] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 51.

*certainly is no such thing as a human right to membership in Walzer's view; why existing polities should feel an obligation to naturalize foreigners is left unexplained*"[219].

Also Walzer is not concerned with the effect of human rights protection on the detachment of individuals from the national polity. He rejects the dualism between human rights and citizens' rights. If such dualism existed he would favor the right to collective self-determination[220]. In fact, in a response to Benhabib, Walzer defended the right of States to pass anti-immigration legislation on the basis of the right to self-determination[221]. Walzer defends the right of the State to control migration but, as I have underlined above, once the migrants are admitted in the territory, they should be put on a quick path to citizenship. Commenting on a proposal by Benhabib to extend voting rights to immigrants and her fear that this might delay the path to citizenship, Walzer acknowledges the risk of "permanent alienage." However, because of this danger he argues "*in* Spheres of Justice *that, in democratic nation-states, resident aliens, guest workers, and any other groups that fit into the old Athenian category of the metic should be put as quickly as possible on the road to full citizenship. Since, in most European countries, all the crucial decisions are made nationally, not locally, the most important pre-citizenship rights are probably those of political and*

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[219] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 119.

[220] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism and equality* (1983), 51; SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004)*, 123.*

[221] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 123.

*economic organization. Allowing new immigrants to vote in municipal elections would be a useful reform, but it is more crucial that they be able to bargain collectively and participate freely in social movements. I am sure Benhabib agrees that whatever conditions she or I would want to attach to citizenship, the right to organize unions and join movements is unconditional*"[222].

Part of the discussion on the decline of citizenship has to do with the recognition of its devaluation in the light of the access migrants have gained to "citizenship goods" outside of the legal formal status. Be it the right to participate politically or the protection of fundamental rights or even certain rights of admittance in the territory, the theorists of the decline of citizenship look at these phenomena as a demonstration of citizenship devaluation. Yet, as Walzer puts it, any theory on migration and citizenship needs to define two basic premises: should immigration be free and citizenship controlled? Should both be controlled under strict scrutiny or should States be free to establish criteria of admittance and then establish clear and relatively easy naturalization policies? Walzer clearly opts for the latter. As I will discuss later, although I would not adhere to the citizenship devaluation thesis – and maybe even Walzer would contest that qualification – I would totally endorse Walzer's conclusion on this subject. Although there is no legal basis– beyond basic principles of international law such as non-discrimination – to restrict the State's competence to regulate migration, there are several compelling arguments to restrict that competence when it comes to naturalization.

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[222] MICHAEL WALZER, In response: support for modesty and the nation-state (2001), 29.

Having said that, I would also subscribe to the following criticisms that Benhabib levels at Walzer's theory. Firstly, Walzer insists on the idea of the need for a naturalization path but fails to provide substantial arguments for this. It is true that in *Spheres of Justice*, Walzer discusses at length the tyranny associated with denying citizenship to effective members of the "club", but he provides no compelling legal or moral arguments. I will discuss this further later.

Secondly, I would agree with Benhabib's claim that a clear line should be drawn between the protections of a refugee and of a migrant and that Walzer does not acknowledge this. In fact, as Benhabib puts it "*from the standpoint of international law as well as moral philosophy, the duties and obligations we owe to strangers who seek entry into our communities on the grounds that they are persecuted - for their ancestry and ethnicity, beliefs or convictions, or because war, persecution, or natural disasters make their homes uninhabitable - is of a different kind than the obligations we owe others who choose to live in our midst. The claims of refugees and asylum seekers do generate stronger obligations of compliance on the part of receiving communities. Denying refuge and sojourn to refugees and asylees would violate a fundamental rule of human morality - namely, to aid those in need - as well as stipulations of the 1951 Geneva Convention relating to the Status of Refugees. Therefore, recipient communities must stand under a "stricter burden of proof" to show why such claims are unworthy of recognition, or how or why recognizing them would jeopardize not just the economic standard of living but the very survival of the receiving communities*"[223].

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[223] SEYLA BENHABIB, Dismantling the Leviathan: Citizen and State in a Global World (2001), 17.

Jacobson begins by acknowledging that human rights are not predicated on nationality and are not based on the distinction between national and foreigner. Yet, he also acknowledges that the human rights codes are becoming the vehicle that is transforming the nation-state since "*the basis of the state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights (...) the state is becoming less a sovereign agent and more an institutional forum of a larger international and constitutional order based on human rights*"[224].

Jacobson goes on to elaborate on the consequences of this blurring of sovereignty on the States' legitimacy in order to conclude that it is increasingly difficult for the State to maintain control and define the national and social boundaries of the polity since, he claims, transnational migration challenges the State's ability to define the people.

Jacobson elaborates on the importance of defining citizenship in order to determine the human fabric of the nation-state, but he places that determination, as Walzer does, at the level of immigration control and not the naturalization process[225]. Jacobson considers border control a vital instrument of sovereignty.

Specifically on citizenship, Jacobson defines it as fulfilling two main tasks: "*first it determines the criteria of membership, that is, who may and may not belong to or join "the people"; and, second, rules of citizenship determine the nature of the "conversation" between the individual and the state – the rights and obligations of the citizen, the kind of access the citizen*

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[224] DAVID JACOBSON, *Rights across borders: Immigration and the decline of citizenship* (1996), 2.

[225] DAVID JACOBSON, *Rights across borders: Immigration and the decline of citizenship* (1996), 5.

*has to the state, and the kinds of demands the state can make upon the citizen*". Yet, he adds that transnational migration is eroding the traditional basis of the nation-state and chief among its aspects is citizenship. That erosion can be seen in the blurring of the difference between citizen and alien. He concludes that the devaluation of citizenship has contributed to the increasing importance of international human rights. He maintains that the devaluation of citizenship and the weakening of sovereign control create questions about the legitimacy of the States[226].

Another sign of the devaluation of citizenship that Jacobson acknowledges is the increasingly lower interest in the citizenship status that migrants show, especially as a result of all sorts of rights being conferred on them, including in some cases the right to vote in local elections[227].

The decline of citizenship theory contests cosmopolitanism departing from the same grounds. It is clear that the nation-state is waning, borders are porous and the States' ability to deal with massive migration movement is limited. What varies in these theories is the assessment of these facts and the proposals on how States should deal with them.

The decline of citizenship proposal, although compelling in its arguments, is somehow weak in its conclusions. The decline of citizenship theorists do not advocate the end of citizenship nor do they propose an alternative status.

Also, the international protection of human rights and the extension of political rights to foreigners at the

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[226] DAVID JACOBSON, *Rights across borders: Immigration and the decline of citizenship* (1996), 7-9.

[227] DAVID JACOBSON, *Rights across borders: Immigration and the decline of citizenship* (1996), 39.

State level have diminished the interest of migrants in acquiring citizenship, Jacobson says.

Again, the decline of citizenship theory is primarily based on a citizenship as rights conception. It does not value other dimensions of the citizenship concept.

By refusing the cosmopolitan approach it also denies an important development of the citizenship concept and its transnationalization.

Finally, as I will later discuss, subsequent developments and data show, contrarily to what Jacobson affirms, that there is a revival of the search for citizenship and naturalization numbers are growing in Europe and in the United States.

## §3. The Universal Protection of Human Rights

### a) Citizenship as rights

In the 20th century the social theory associated citizenship with the possession and exercise of rights[228]. The citizenship-as-rights theory has been articulated by T. H. Marshall[229]. For Marshall, citizenship is an enjoyment of rights achieved in the civil, political and social spheres of capitalist societies[230].

In the legal field, Marshall's citizenship concept was adopted by constitutionalists, such as Charles Black[231] and Kenneth Karst[232].

According to this theory the content of citizenship, its rights and the way these can be possessed and exercised is the necessary condition of citizenship[233].

Bosniak acknowledges some difficulties with this theory. Firstly, when citizenship is placed at a level of recognition of rights, a central question is by whom should these rights be recognized, and against whom.[234] Underlying these theories, and this may be the reason why the above question is not raised by the citizenship-

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[228] According to Chief Justice Warren, "Citizenship is man's basic right, for it is nothing less than the right to have rights". See WARREN, C.J., Dissenting Opinion, Perez v. Brownell, 356 U.S. 44 (1958).

[229] T. H. MARSHALL, *Citizenship and Social Class and Other Essays* (1950).

[230] LINDA BOSNIAK, Citizenship Denationalized (2000), 464.

[231] CHARLES BLACK, *Structure and relationship in constitutional law* (1985).

[232] KENNETH KARST, *Belonging to America: equal citizenship and the Constitution* (1989).

[233] LINDA BOSNIAK, Citizenship Denationalized (2000), 465.

[234] LINDA BOSNIAK, Citizenship Denationalized (2000), 466.

as-rights theorists, is the idea that the *locus* of these rights is the nation-state.

However, as I have stressed above, the citizenship-as-rights theory was subject to a more recent approach, which was transnational in nature. Departing from the citizenship-as-rights theory, the post-national citizenship concept detached it from the nation-state and placed it at the transnational level.

It is also the case – as I will later elaborate, especially about voting rights – that the municipal law of most States grants many rights to non-citizens.

In the context of the Universal Declaration of Human Rights and of the liberal democracies' constitutions, it is human dignity rather than citizenship that defines the recognition of human rights[235]. We can identify a basic framework of human rights that are granted to everyone regardless of their relationship with a specific State. Those rights are inherent to all human beings. This would be a basis for a global citizenship where we could find a perfect match between the person and the citizen since both would hold the same rights.

We can no longer argue that basic human rights are the exclusive preserve of citizens. The common ground for these rights is personhood and not citizenship. Since ancient Greece, citizenship has been used as a pretext to exclude people from rights. It was the basis for discrimination based on race, gender and State origin.

In the 20th century the international protection of human rights was associated with the increasing importance of legal protection for the individual and human dignity.

Migratory movements played their part in this development. The porous nature of the States' borders

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[235] RAINER BAUBÖCK, *Transnational Citizenship* (1994), 239.

and the mass migratory movements brought new claims and necessities which were previously unknown.

A very important feature of the development of international legal protection for the individual is the requirement of legal personality in international law, and the recognition of the individual as a subject of international law.

### b) The individual as subject of international law

In the first stages of the development of international law, States were the only actors and subjects of international law[236].

The first manifestations of the international relevance of the individual were deeply connected with the States' actions. This was the case of diplomatic protection, diplomatic immunities, and the status of heads of state, government officers and foreign affairs ministers.

The individual emerged with autonomous relevance in the international legal order with the protection of human rights, the exercise of a right to self-determination of peoples, protection of minorities and the creation of the International Criminal Court.

The controversy about the international subjectivity of individuals is still going on among scholars and international courts. An important question these days is whether individuals can be recipients of international legal norms.

The answer to this question tends to be positive in all the cases where the individual establishes a direct

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[236] ANTONIO CASSESE, *International law* (2005), 143; RUTH DONNER, *The regulation of nationality in international law* (1994), 18.

relationship with other subjects of international law, be it because that possibility is conferred by general international law or because it is conferred by specific international treaties.

For a recent example that resumes the tradition of diplomatic protection as a cradle for international protection of human rights, and which also concerns the nationality of corporations, following the *Barcelona Traction Case*, it is interesting to analyze the International Court of Justice's decision on a dispute between the Republic of Guinea and the Democratic Republic of Congo, known as the *Ahmadou Sadio Diallo* case[237].

Ahmadou Sadio Diallo was a Guinean citizen, settled in the DRC. There, he founded an import-export company. At the end of the 1980s, Diallo's company brought a case against its business partners in an attempt to recover various debts. The various disputes continued throughout the 1990s and for the most part remain unresolved today.

Apparently for no reason, but in connection with these lawsuits, Mr. Diallo was arrested and imprisoned. According to the Court, those deprivations of liberty were "arbitrary" and Mr. Diallo was not informed, at the time of his arrests, of the reasons for those arrests, nor was he informed of the charges against him.

The public prosecutor in Kinshasa ordered the release of Mr. Diallo after the case was closed for "inexpediency of prosecution". In 1995, the Zairean Prime Minister issued an expulsion decree against Mr. Diallo. Mr. Diallo was arrested and placed in detention with a view to his expulsion. After having been released

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[237] ICJ decision Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).

and rearrested, he was finally expelled from Congolese territory in 1996.

The Court decided that "having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility (...) In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation (...) The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings"[238].

Although it was a dispute between two States, at the centre of the dispute was the violation of an individual's human rights. In a sense, it is recognition of the capacity of the individual to be holder of fundamental rights in the international arena.

The international subjectivity of the individual should then be considered whenever his relationship

[238] ICJ decision Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).

with the international order justifies an intervention beyond the State.

The international protection of human rights is an example of that subjectivity, even within a State's borders. In fact, as we have witnessed in recent events, sometimes the international community acts to protect human rights of individuals against their own State (as shown in the recent intervention of the international community in the Libyan conflict). The slaughtering of a part of the population – as in genocide – or violence committed against the State's own population in general can be the object of international intervention. According to the UN charter, this can take –the form of humanitarian relief, the deployment of armed forces to restore peace or even the creation of international criminal tribunals[239].

Another example of subjectivity is the international criminal justice system. Although the purpose of these courts is to punish perpetrators of international crimes and not to vindicate the rights of the victims, their provisions are applicable to individuals and not to States and international organizations. So unlike in other international courts – such as the International Court of Justice – the defendant in the procedure is an individual rather than a State.

The first tribunals to be created in the aftermath of the World War II were those set up in Nuremberg and Tokyo to try the war crimes committed by Nazi

[239] According to chapter VII of the UN charter: "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security".

officials. Much later, *ad hoc* tribunals for the war crimes committed in the former Yugoslavia and in Rwanda were created by Resolutions 827 of May 25, 1993 and 955 of November 8, 1994. These tribunals were intended to bring to trial the perpetrators of the war crimes committed against the population of the aforementioned countries, whose courts were unable to deal with the situation.

The example of these courts is usually used to illustrate the discussion about the international subjectivity of the individual since they are examples of the direct intervention of individuals in the international legal order. Finally, in 1998, the Statute of Rome on the International Criminal Court was approved, and it entered into force on 1 July, 2002. Today international criminal justice is clearly a field of international subjectivity of the individual because the individual is not only subject to its norms but also to the jurisdiction of its court.

Of course, as stressed above, a major field for the affirmation of the individual as a subject of international law is the international protection of human rights. That protection is clear in international instruments such as the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations on December 10, 1948 or the International Covenant on Civil and Political Rights, adopted on December 16, 1966. At the European level, the same can be said about the European Convention on Human Rights or the European Charter of Fundamental Rights.

This new approach to the individual by international law goes back to its original configuration as "*ius gentium*", by placing human beings at the center of the international legal order. Having human dignity

as a common background, the center of this new global order is the person and personhood.

An interesting proposal in this same direction is made by Rafael Domingo in his recent book on "The new Global Law" in which he advocates that the difference between international law and global law is precisely the role of the individual. International law is a law of States and international organizations whereas global law is the law of persons, placing the human being at the center of the international legal order[240].

This dimension is very present in the theorists that study transnational citizenship. From the second half of the 20th century onwards, international law abandoned its exclusively State-centered configuration. The movement towards revaluing the individual in the international arena, resulting from the internationalization of human rights, produced clear consequences with regard to citizenship. Thus a legal order envisaged for the inter-State relationship has been changed into a person-centered legal order.

### c) The citizenship-as-rights theory critique

As I have shown above, citizenship was seen for a long time as a reserved domestic domain of the State. In fact, the purely inter-State dimension of citizenship can only be addressed as a problem of international law in the sense that it constitutes a dispute of applicable laws. As I have stressed above, the first international interventions in the citizenship domain targeted the resolution or elimination of disputes between States.

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[240] RAFAEL DOMINGO, *The new global law* (2010).

However, as I have also shown, the paradigm changed dramatically, and these changes made it possible to foresee a fundamental right to individual citizenship rather that an international law for dispute resolution between States.

This, moreover, departs from the notion that the transnationalization of citizenship needs a *locus* of protection, due to the lack of a global authority.

As Bosniak stresses, apart from the risk of overstating the degree to which the international human rights regime actually protects the individual, it is important to acknowledge that the protection is made available to individuals by way of their States[241].

This means that for those who claim that the international protection of human rights is weakening the concept of citizenship it is important to state clearly that the international global order has not entirely replaced the nation-state and that citizenship within the nation-state is ultimately still a vehicle to enjoy the full protection of rights. This is particularly evident in the case of undocumented migrants, as I will later discuss.

Also, the theory, as compelling as it is, still largely relies on a citizenship-as-rights conception. Here we should take into consideration not only that citizenship entails other elements besides rights, but also that not all the rights can be included in the international protection of human rights. In fact, we can still look at some rights – political rights – as being typical citizenship rights as they might not be recognized as inherent to all humans beings but only to those who are active members of a community and while they participate in it. As every human being is, in principle, member of, at least, one community, it can be said that

[241] LINDA BOSNIAK, Citizenship Denationalized (2000), 468.

political rights are also human rights. Although this assertion might be true, political rights are defined by a specific relationship between the person and the State and therefore they are not inherent to a human being in whatever circumstance. In any event there is a growing movement in the direction of granting political rights to aliens, at least to documented immigrants.

## §4. Transnational political activism

Citizenship is usually referred to as political activism or civic engagement. This is certainly not the legal status of the citizenship related concept, but it has entered the vocabulary.

Hannah Arendt has written on this notion of citizenship[242]. In this sense, citizenship means the nature of the public involvement by members of the polity[243]. A citizen would then be an active member of the political community. The roots of this idea are found in the Greek tradition of citizenship, as I have above described.

According to Maurizio Passerin d'Entreves, Arendt's conception of citizenship is articulated around the public sphere, political agency and collective identity. These themes are crucial in the construction of democratic citizenship. According to Arendt's thinking, "*the practice of citizenship depends on the reactivation of a public sphere where individuals can act collectively and engage in common deliberation about all matters affecting the political community (...) Participatory citizenship is also essential in the attainment of effective political agency since it enables each individual to have some impact on the decisions that the well being of the community*"[244].

Yet this idea entails a concept of political engagement detached from a particular *locus*. The very

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[242] HANNAH ARENDT, *The human condition* (1998 [1958]), 50-58.

[243] LINDA BOSNIAK, Citizenship Denationalized (2000), 471.

[244] MAURIZIO PASSERIN D'ENTREVES, Hannah Arendt and the Idea of Citizenship (1992), 164-165.

notion of participation does not depend upon a specific place but on the activity itself, and that contradicts a settled concept of modern times according to which the *locus* of citizenship is the nation-state.

There is also a transnationalization movement regarding political activism. Thus citizenship as a political activity can not only be seen at the national level but also at the international level. Often that is the phenomenon that authors refer to when mentioning transnational or global citizenship[245]. This tendency can be found in new ways of transnational political organization in the form of non-governmental organizations, social movements and other forms of organizations related to the protection of the environment or of human rights[246].

According to Richard Falk, there is a growing movement of what he calls "globalization from below", that is, in essence, a "democracy without frontiers". In that sense citizenship is in the realm of the construction of a global civil society that is seeking to extend ideas of moral, legal and environmental accountability. For Falk there are four dimensions of citizenship beyond traditional boundaries of the nation-state: i) the aspiration to the unity of human experience as seeking to create a better world; ii) the tendency towards global integration as a result of economic globalization (ex. G-7 summits); iii) an expanding consensus of informed people around the world on the survival of mankind (issues like energy, resources and the environment); and iv) transnational militancy towards international causes and the ability to change mainstream views[247].

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[245] RICHARD FALK, The Making of Global Citizenship (1993).

[246] LINDA BOSNIAK, Citizenship Denationalized (2000), 474.

[247] RICHARD FALK, The Making of Global Citizenship (1993), 40-41.

Interestingly, two of the major examples of transnational political activity are both against the leaders in political and economic globalization (such as at non-institutional summits like the G-7 or against multinational companies like McDonalds[248]) and against globalization (demonstrations at Davos World Economic Forum or at the G-7 summits). So probably one of the best examples of transnational political activism is precisely the demonstration against globalization!

Examples of other organizations can also illustrate this form of transnational activism with focused causes and stabilized activity. This is the case of transnational organizations for the protection of the environment (like Greenpeace) or for the protection of international human rights (such as Amnesty International or Human Rights Watch)[249].

The criticism that can be made of this new form of citizenship is that it has no institutional basis and exists in the anarchy of a non-regulated global order[250]. Therefore the absence of a World State would obstruct the existence of a transnational citizenship.

As Bosniak very elegantly describes it, "*one could argue that "transnational activism as transnational citizenship" fulfills the normative requirements of the theory of political citizenship very well. For here, citizenship does not suffer the thinness and passivity of status-based and rights-based conceptions; it is robust and engaged, reflecting "commitment to the common good and active participation in public affairs*"[251].

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[248] RICHARD FALK, The Making of Global Citizenship (1993), 39.

[249] MARIA DA GLÓRIA GARCIA and GONÇALO MATIAS, Anotação ao artigo 66º (2010).

[250] LINDA BOSNIAK, Citizenship Denationalized (2000), 475.

[251] LINDA BOSNIAK, Citizenship Denationalized (2000), 479.

In fact, I do not believe that the latter reason can be regarded as the major obstacle for a transnational citizenship based on transnational political activism. This criticism is State-centered since it refuses to consider citizenship outside of an established State. According to this view it would only be possible to achieve transnational citizenship in the remote event that the national States were replaced by a global State.

In my view, more relevant than the absence of an institutional framework is the absence of democratic mechanisms and political representation. Political activism and participation can only be considered as elements of citizenship if they contribute to the creation of a democratic community. Peter H. Schuck argues that post-national citizenship is only possible and meaningful in reasonably democratic States[252]. It is necessary that the *locus* of that participation shows the mechanisms of a liberal democratic society that is able to enhance and control political will, participation and representation. Political activism and participation cannot be seen as a citizenship element in authoritarian regimes that restrict freedom of expression. It is useless to consider political participation if it cannot influence political choices.

This view is very different from the State-centered one that calls for a global State. I am advocating a democratic forum that can work as a cradle for transnational political activism and reduce the criticism of an absence of political participation in the global order.

In any event European citizenship can be identified as an example of institutional transnational citizenship, somewhere in between national and transnational

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[252] PETER H. SCHUCK, The re-evaluation of American Citizenship (1997-1998), 32.

citizenship. European citizenship reproduces the citizenship elements as it tries to replicate at the Union level the idea of common rights, status and political participation. I will develop this idea in the next chapter.

The citizenship as political activism theory departs from a concept of citizenship as political participation. Thus, it helps us to understand how multifaceted and rich the citizenship concept is.

However, acknowledging all these facets of the concept also entails acknowledging that relying on the legal status to define citizenship is probably too limited. It is just not sufficient to legitimate citizenship upon the decision of the sovereign within the nation-state.

Citizenship as political activity is a central idea that aids an understanding of the democratic paradox and the principle of democracy that I will develop in the last chapter. In fact, there can be no meaningful citizenship without substantial political participation. Consequently, proper citizenship in a democratic context needs to be inclusive and allow participation for all the active members of the community.

## §5. Dual and multiple citizenships

The plural citizenship phenomenon has been identified as another sign of citizenship transnationalization[253]. In fact, the mass migration movements in recent years have provided the opportunity for multiple attachments[254]. These attachments lead the migrants to seek naturalization in their host country while often retaining citizenship in their home country.

According to Stephen Legomsky, "*large-scale dual nationality is made possible by the interaction of three fundamental maxims. Maxim # 1 [subject to some expanding exceptions] is that each state decides who its own nationals are. Maxim # 2 is that, in making those decisions, a given state typically provides alternative, multiple routes to nationality. These alternative paths frequently confer nationality by virtue of birth in the state's territory ("jus soli"), by descent from one or both of one's parents ("jus sanguinis"), and by naturalization. Maxim # 3 is that the rules vary from state to state*"[255].

The combination of these factors explains the increasing numbers of dual and multiple citizenships these days. Peter Spiro says that "*although statistical information is lacking, it is clear that there has been an*

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[253] LINDA BOSNIAK, Citizenship Denationalized (2000), 505.

[254] STEPHEN H. LEGOMSKY, Dual nationality and military service: strategy number two (2003), 122.

[255] STEPHEN H. LEGOMSKY, Dual nationality and military service: strategy number two (2003), 81.

*explosion in the numbers of individuals holding plural citizenship*"[256].

Despite being skeptical about the transnational nature of the multiple citizenship phenomenon, Bosniak acknowledges that it entails some transnational aspects[257], affirming that "*the claim that plural nationality actually enhances, as well as undermines, state power (or the power of at least some states) maybe contestable but it is plausible enough to suggest some circumspection to those who uncritically embrace the idea that plural nationality leads to national decline*"[258].

In any event, it is clear that there is a growing tendency for dual and multiple citizenships. For many years dual citizenship was perceived as an anomaly or an abomination[259]. As I described above, international law fought against the phenomenon. However, there has been a recent change towards multiple citizenships.

Firstly, the notion of sovereignty over citizenship lost much of its original meaning. Then, the rise of the human rights age made it easier to recognize multiple attachments of the individual and his right to claim rights within each of those attachments[260].

Also one should consider the question of multiple citizenships from the perspective of interests. For many years, multiple citizenships tended to be a source of conflict between States. Then, progressively, States

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[256] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 112; in general, ALFRED BOLL, *Multiple Nationality and International Law* (2007).

[257] LINDA BOSNIAK, Multiple nationality and the postnational transformation of citizenship (2003), 38-39.

[258] LINDA BOSNIAK, Multiple nationality and the postnational transformation of citizenship (2003), 44.

[259] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 111.

[260] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 116.

understood that this could be beneficial. So the transition in the perception of multiple citizenships went from them being detrimental to neutral to beneficial, especially from the home state perspective[261]. In fact, and this factor was particularly evident in the negotiation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – as I will discuss in the fifth chapter –, for the sending countries it is very important to maintain attachments with the migrants. They do not want them to integrate too well because maintaining the link with the home country makes it easier and more probable for the migrant to keep the flow of remittances that in some cases represents a significant source of income to these countries[262].

So allowing citizens to maintain their citizenship despite their acquisition of another citizenship and longtime residence in another country is completely justified from the perspective of the sending country's interest.

Given that multiple citizenship is not imposed, but is rather a voluntary phenomenon, it is also interesting to analyze the migrant's perspective. Multiple citizenship would not be as popular if the obligations entailed were overwhelming or represented a sacrifice for those who held it.

So this raises the question of the obligations citizenship entails. So far – and it is often the case – the discussion about citizenship has been about rights. Yet when we discuss the advantages of having more than one citizenship, the obligations side arises.

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[261] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 117.

[262] On the benefits and costs of dual citizenship see PETER H. SCHUCK, Plural Citizenships (2002), 74-86.

There are typically two obligations connected with citizenship: military service and taxes.

According to Legomsky, there are two possibilities for dealing with the problem related to military service: reduce the number of dual nationals or try to solve the problems that dual nationality poses within the military service context. His option is the latter. Yet as Legomsky abundantly shows in his article, the problems have been solved either by transforming the military service into a voluntary obligation – in many countries – or by concluding bilateral or multilateral agreements that will deal with this issue[263].

With regard to taxes, criteria other than citizenship have been elected to determine the relevant taxation place, namely residence. In those cases where citizenship might still play a role, international agreements, both bilateral and multilateral, have also been signed in order to deal with problems related to multi-taxation[264].

So the major obligations that are attached to citizenship and that might constitute an obstacle to multiple citizenship and naturalization from the migrant's perspective have been progressively resolved, either internally – in the sending countries by removing barriers to the naturalization in the host country and by eliminating denationalization clauses; in the host countries by facilitating naturalization policies and eliminating military service obligations – or internationally by regulating in international treaties questions like the fulfillment of military obligations and international taxation.

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[263] STEPHEN H. LEGOMSKY, Dual nationality and military service: strategy number two (2003), 122-123.

[264] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 118.

However, as Spiro acknowledges, it is one thing to recognize the increasing numbers of dual citizens, due to the causes already identified, and the evolution of its worldwide acceptance due to the States' and individuals' interests, and quite another to frame it as an individual right. Yet Spiro actually makes the case for dual citizenship as a human right.

According to Spiro, though, the right to citizenship should be recognized in accordance with the internal rules of citizenship, in line with the Legomsky maxims.

For Spiro, the human right to dual citizenship rests on two basic arguments: the conception of citizenship as identity and a form of association and citizenship as necessary to perfecting political rights of self-governance[265].

Being a form of membership, equated with membership in other organizations, citizenship should not be restricted. As a matter of both constitutional and international law, States may not restrict membership in non-State entities without a necessary cause. According to Spiro, even when the association takes place in a foreign State that does not necessarily remove citizenship from the category for constitutional purposes[266].

For me the most compelling argument Spiro uses in his case for dual citizenship as a human right is the idea of plural citizenship as a political right.

According to Spiro, "*plural citizenship implicates self-governance values. Formal status is typically necessary to the perfection of political rights. If plural citizenship is obstructed, with the result that an individual is denied a citizenship for which she would*

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[265] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 118.

[266] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 119-120.

*otherwise be eligible, political rights are likely to be compromised. The acquisition and maintenance of plural citizenship thus becomes a protectable predicate status*". However, Spiro is then very clear about his proposition in terms of the right to citizenship. He clearly states that "*this again implicates state discretion in determining membership qualifications. International law has afforded states broad discretion with regard to naturalization. There is, however, an increasing disconnect between the legal regime and the liberal self-governance paradigm. Liberal theory works from the premise that those who are territorially present are members of "society," are affected by governmental action, and should be able to participate in self-governance on the basis of equality. Hence, liberal theory has assumed the virtue of low barriers to naturalization. Some theorists have asserted the necessity of a naturalization option after a period of residence. Under that approach, the renunciation condition appears to offend liberal values, insofar as it contributes to a disconnect between society (defined in territorial terms) and the polity (defined by citizenship status)*" [267].

Following this, Spiro acknowledges the existence of possible objections to his proposition, the first main one being that plural citizenship undermines equality and dilutes the solidarity of the citizenry and the second that it will undermine the solidarities necessary to support the liberal state. This last objection is deeply

[267] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 123-124. For compelling arguments on a right to naturalization after a residence period and the dual citizenship theory see JOSEPH H. CARENS, Citizenship and Civil Society: What Rights for Residents (2002), 100-118.

linked with the naturalization process and requirements[268].

Finally, Spiro makes his case for a right to dual citizenship both in constitutional and international law. He recognizes though that international law provides a more stable framework for his claim and gives as an example the attitude of the 1997 European Convention on Nationality towards dual citizenship, this being the first international instrument to not deny its desirability[269].

Spiro's case, given that it is so thorough and has been engaged by a scholar who has conducted an in-depth study of the dual citizenship phenomenon, is very relevant.

Firstly it puts plural citizenship in its rightful place. Notwithstanding the massive development it suffered both in terms of number of acquisitions and in the attitude of countries and individuals towards it, multiple citizenship is still largely a national phenomenon and implies the decision of multiple States. So it does not simply ignore the activity of the nation-state.

More importantly, Spiro recognizes dual citizenship as a human right anchored both in internal constitutional law and, above all, in international law.

Evidently Spiro is very cautious in his disclaimer by repeating that in order to acquire dual citizenship the individual must comply with the internal rules of the States.

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[268] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 125-128.

[269] PETER J. SPIRO, Dual Citizenship as Human Right (2010), 129-130. In general on multiple citizenship and international law see ALFRED BOLL, *Multiple Nationality and International Law* (2007), 267-295.

The arguments that he uses, though, have no relationship whatsoever with the State discretion over citizenship. They could in fact be used – and I will use them, at least the second one – to call for the human right to a certain citizenship – be it the first, the second or the third – regardless of the State power over it.

In fact, for Spiro, one of the main arguments in his case is the democratic principle and democratic participation. Depriving a person with multiple attachments of political rights either in the host State or in the sending State is, for Spiro, undemocratic.

He recognizes – unlike the decline-of-citizenship theorists – that the formal citizenship status is necessary in order to properly exercise political rights in a given country.

The problem with Spiro's case seems to me to be exactly the lack of scrutiny he dedicates to naturalization rules. Spiro is very concerned with renunciation and mandatory termination of original citizenship. This is a common concern of the theorists who study and favor dual citizenship[270]. This concern has to do directly with the State's sovereignty over citizenship and naturalization. Virtually speaking, if every country in the world adopted a rule that dual citizenship would not be possible and that naturalization entails renunciation of the previous citizenship, dual citizenship would vanish. Yet contesting this rule would be admitting that a State's sovereign decision over citizenship is disputable.

So if not being able to fully participate without the status offends, in Spiro's view, the democratic

[270] For a thorough analysis on loss of citizenship and dual citizenship see GERARD-RENE DE GROOT, Loss of Nationality: a critical inventory, (2002), 202-278.

principle, then it should be considered as having an effect not only on the right to have dual citizenship but also on the right to have a certain citizenship even if the internal rules of the State do not indicate so.

## §6. Multiculturalism and citizenship

Multiculturalism theories have been under pressure in recent years[271]. Declarations on the failure of multiculturalism – like the one produced by German Chancellor Angela Merkel – and legislative measures like those adopted in France as a reaction to the scarf affair (*l'affair du foulard*), abundantly show that integration policies for migrants can and will be bitterly disputed even in liberal democracies.

The very basis of multiculturalism is not at stake. Multiculturalism theories do not contest some form of cultural integration. As Kymlicka recognizes "few immigrant groups have objected to the requirement that they must learn an official language as a condition of citizenship"[272]. The host countries must, in return, provide the necessary conditions for such integration. Failing to do so will result in unjust integration requirements or undemocratic integration policies.

When discussing the relationship between multiculturalism and citizenship, it is very important to distinguish between multiculturalism before and after naturalization.

Many of the examples of multiculturalism failure have nothing or little to do with naturalization policies. Sometimes they relate to citizens of origin that remain

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[271] For an account on the evolution of multiculturalism and citizenship see WILL KYMLICKA, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (2001), 17-27.

[272] WILL KYMLICKA, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (2001), 29-30.

in disenfranchised areas or pockets of cultural disintegration.

For the purposes of this discussion, the relevant multiculturalism concept is the one related to the acquisition of citizenship via naturalization, in particular, how important cultural integration should be as a criterion for naturalization.

It is also important to discuss how cultural assimilation can be in opposition to transnational citizenship. If total integration is demanded – by not only absorbing the host country's language and cultural background but also breaking the ties with the home country's culture – it might be an indirect way of denying transnational citizenship and multiple citizenships. I say indirect because while the naturalization regulation of dual citizenship that demands termination of the former citizenship is clear enough and under the direct scrutiny of the international community, assimilation policies act silently but can be as effective. Behind the curtains of a totally acceptable naturalization policy a country can hide a forceful assimilation demand that either makes it impossible to become naturalized or demands total assimilation on a take it or leave it basis, or – even worse – take it and leave it (your former culture).

It is also important to recall that countries' policies do change. As Kymlicka affirms, certain groups, like the Turks in Germany, have not been encouraged to integrate[273]. So when Chancellor Merkel calls for the failure of multiculturalism what is really at stake is the national policy of integration, and a claim for a better or more extensive integration policy. Yet it is also important to acknowledge that human beings are under

[273] WILL KYMLICKA, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (2001), 31.

pressure here and that a shift in a country's multiculturalism approach will impact the lives and legitimate expectations of millions of people. It brings back the discussion which has existed since the beginning of multiculturalism theories and ultimately the division between liberals and communitarians[274].

According to Seyla Benhabib, "*the most spectacular examples of multicultural conflict which have occupied public consciousness in recent decades, such as the Salman Rushdie affair in Great Britain, the affaire over the foulard (head-scarf) in French schools, and scandals around the practice of female circumcision",* are somehow related to the groups of culturally and ethnically identified migrants that have operated, in recent years, what can be designated as a "reverse globalization"[275].

The scarf affair dates back to 1989 when three girls – Fatima, Leila and Samira – were forbidden to wear their head scarves by the school headmaster. They insisted on wearing the scarf in what could be noted as a politically driven attitude[276].

In 1989 the case was brought to the French Conseil d'Etat, which reached the following conclusions: "*in schools, the wearing by students of signs by which they wish to express their religious affiliation is not in itself incompatible with the principle of secularism since it constitutes the exercise of freedom of expression and*

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[274] WILL KYMLICKA, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (2001), 18; Id., *Multicultural citizenship: a liberal theory of minority rights* (1995).

[275] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 184.

[276] I follow closely the fact descriptions and conclusions as in SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 184-198.

*manifestation of religious beliefs, but this freedom does not allow students to display signs of religious affiliation, which by their nature, the conditions under which they would be worn individually or collectively, or by their ostentatious or protest would be an act of pressure, provocation, proselytism or propaganda, would undermine the dignity or freedom of the student or other members of the educational community, jeopardize the health or safety, disrupt the teaching and the educational role of teachers, or disturb the order in the establishment or normal operation of public service*"[277].

It is a somewhat Solomonic decision, as Seyla Benhabib describes it, that "*eventually came to stand for all the dilemmas of French national identity in the age of globalization and multiculturalism: how to retain French traditions of laïcité, republican equality, and democratic citizenship in view of France's integration into the European Union on the one hand, and the pressures of multiculturalism generated through the presence of second and third generation immigrants from Muslim countries on French soil on the other*"[278].

What this decision ultimately illustrates is that the assimilation practice fails to achieve its objectives. No matter how strict a country is in trying to assimilate the migrant community, there should always be room for diversity and the maintenance of original cultural ties. Plus, from a constitutional and international law standpoint, full assimilation conflicts with the

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[277] Avis rendus par l'assemblée générale du Conseil d'État N° 346.893 - Mme LAROQUE, rapporteur (section de l'Intérieur) séance du 27 novembre 1989.

[278] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 190.

fundamental rights of freedom of expression, freedom of religion and other personality rights.

Thus multiculturalism cannot be addressed disregarding these fundamental principles and rights.

The scarf affair also appeared in Germany, in the form of a complaint presented to the German Constitutional Court by Fereshta Ludin, a school teacher of Afghan origin but with German citizenship who was denied the right to wear a scarf at school. She petitioned to be appointed to a teaching position in the state of Baden-Württemberg. In her constitutional complaint she challenged the decision of the Stuttgart Higher School Authority, which had been confirmed by the administrative courts, refusing to appoint her as a civil servant on probation as a teacher at German primary schools (*Grundschule*) and non-selective secondary schools (*Hauptschule*) on the grounds that her declared intention to wear a headscarf at school and in lessons meant that she was unsuited for the office[279].

The court decision was as follows: "*a provision prohibiting teachers from continuously showing their membership in a particular religious group or belief by external signs is part of the law determining the relationship between state and religion in schools. The religious diversity in society, which has evolved gradually, is reflected here particularly clearly. School is the place where differing religious views inevitably collide and where this juxtaposition has particularly great effects. Tolerant coexistence with people of other beliefs could be practised here with most lasting effect through education. This need not mean denying one's own convictions; instead, it would give a chance for insight and to strengthen one's own point of view, and for mutual tolerance that does not see itself as reducing*

[279] BVerfG, 2 BvR 1436/02 of 09/24/2003.

*all beliefs to the same level (cf. BVerfGE 41, 29 (64)). Reasons could therefore be given for accepting the increasing variety of religions at school and using it as a means for practicing mutual tolerance and in this way making a contribution to the attempt to achieve integration. On the other hand, the development described above is also associated with a greater potential for possible conflicts at school. There may therefore also be good reasons to accord the state duty of neutrality in schools a stricter importance that is more distanced than it has been previously, and thus, as a matter of principle, to keep religious references conveyed by a teacher's outward appearance away from the pupils in order to avoid conflicts with pupils, parents or other teachers (...)As long as there is no statutory basis that indicates specifically enough that teachers at the primary school and non-selective secondary school have an official duty to refrain from identifying characteristics of their religious affiliation at school and in lessons, then on the basis of prevailing law it is incompatible with Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law and Article 33.3 of the Basic Law to assume that the complainant lacks aptitude. The decisions challenged by the constitutional complaint therefore infringe the legal position of the complainant guaranteed in these provisions*"[280].

The reading of this decision was a major victory for Fereshta Ludin and advocates of multiculturalism. However, the Court was, in fact, saying that it is possible for the states to approve legislation that bans the scarf; it cannot just be an administrative decision. So the decision was more of a procedural decision than a substantial one. Moreover, the legislator responded

[280] BVerfG, 2 BvR 1436/02 of 09/24/2003.

very quickly by approving legislation that banned religious symbols[281].

A balanced integration policy needs to recognize a country's fundamental right to self-governance and determination. So if a balance is needed it should be between the individual's rights and freedoms and the collective right to self-determination.

As Spiro states, "*multiculturalism demands redistributive and other forms of justice from the state, but it also seeks group autonomy in social, cultural and even political spheres. Multiculturalism borrows key concepts from global characterizations of group distinction. The term "self-determination", a familiar doctrine of international law protecting the claim of nationhood and sovereignty by certain communities, is also deployed by multiculturalists in the domestic context to advance group autonomy*"[282].

The developments that I have shown above favor the individual's standpoint.

Firstly, this is the case because an individual's right – especially in this context – tends to protect a minority against the majority will. Thus, favoring the majority would undermine these fundamental values.

Secondly, as I have also shown, the evolution of fundamental rights created a "human rights" era where the person is at the center and where personhood has replaced citizenship[283]. This evolution tends to favor individual choices instead of collective choices.

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[281] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 200.

[282] PETER SPIRO, *Beyond citizenship: American identity after globalization* (2008), 130.

[283] PETER SPIRO, *Beyond citizenship: American identity after globalization* (2008), 133.

Lastly, forced assimilation creates worse problems than voluntary assimilation. Ultimately migrants will obtain citizenship. The recent examples in France, Germany or the United Kingdom show that frequently examples of violence and complete disenfranchisement are shown by citizens – naturalized or of origin. The explanation for that fact is very simple: migrants on a path to citizenship do not involve themselves in controversy since what they stand to lose is much greater than their potential gain. The incentive is to keep quiet and wait for citizenship. Once the status is acquired – and one should not assume that the problems arise in naturalized communities because this often happens with disenfranchised citizens of origin – they have little to lose.

Forced assimilation and strict naturalization policies will only achieve an artificial peace created by raised expectations and controlled emotions that might explode like a gunpowder barrel once the status is acquired.

How then should a country be constitutionally inclusive and yet protect itself from cultural invasion or, worse, the crumbling of basic principles and identities?

According to international law and the majority of legal and philosophical theorists, a country possesses several moments or layers of decision. Very few advocate – and I am not included in that group – that the state should open its borders and not control migration.

Even after entering the state's territory, the border follows the migrant in a way, meaning that deportation is always pending and that substantive immigration decisions will follow in the process. Often a person enters the territory holding a certain status and then

changes it until he attains permanent residency and citizenship.

I am not advocating – and here I am making a normative policy argument and not a claim based on international law – an open borders theory or a denial of some sort of assimilation. However, a country cannot – based on principles of democracy and expectations that I will discuss further in the final chapter – simply raise the expectations of a part of its population by letting it stay after different layers of immigration decisions and then solemnly declare that the strategy failed and people should be sent home. Where is home in those cases?

The proof that the described strategy does not work is that in most of the more serious cases the disenfranchisement with the community – or at least its public manifestation – is led by citizens. No one would reasonably defend that these individuals should be deprived of citizenship without harking back to the dark times of humanity like the Nuremberg laws.

My case is for a conscientious and proportional immigration law and policy that may assess the entire immigrant population of the country at any time – documented or undocumented – and use the different layers of decision to protect itself against organized crime, violations of basic principles and cultural disenfranchisement.

Assimilation policies and speeches against multiculturalism simply will not work if produced at the edge of naturalization or after it. The naturalization process is not – as I will later elaborate – the appropriate moment for substantial assessments of assimilation or cultural incorporation.

## IV – European Citizenship as a form of institutional transnational citizenship

### §1. European Citizenship: the debate

If there is a good example of a transnational citizenship, European citizenship might be it.

It is definitely not a national citizenship since the European Union (EU) is not a federal State nor was the EU citizenship status created in that direction, as I will discuss in this chapter.

Despite these limitations, EU citizenship has been undergoing significant developments, most of them resulting from the Court of Justice of the European Union's (CJEU) judicial activism that will eventually transform EU citizenship into something closer to a federal status.

For the moment, despite those very promising developments that I will later describe, EU citizenship is probably the only example of an institutional transnational citizenship because, as I have stated above, it holds most of the citizenship elements and aspires to include all of them.

It also very relevant to acknowledge – and this is increasingly evident in the more recent and revolutionary CJEU decisions – the relationship between EU citizenship and national citizenship and the intense constraints that the former impose on the latter. Even if the domestic reserved domain is still the official doctrine that the Court wishes to proclaim, decisions are going in a different direction imposing

stronger and tighter obligations on States´ decisions over citizenship.

The evolution shows a trend towards a federal citizenship in the EU, but it also helps to support my general idea of a growing influence of global, transnational and international law on citizenship issues. This has been acknowledged expressly by the CJEU in the decisions that I will discuss since it refers to principles of international law as boundaries to member states' decisions on citizenship.

The evolution of the EU has brought the topic of European citizenship to the center of European concerns nowadays. It would not be possible to support any kind of European project without the creation of the EU for the Citizens facing not only the needs of its population but also a consciousness of a European people.

The purpose of creating European citizenship was not only to create a legal status but also to take advantage of the symbolic meaning of the citizenship concept.

For these reasons in 1992 the Maastricht Treaty created European citizenship, stating in article B that it was a means of "reinforcing the national rights and interests of the member States".

Article 20 of the Treaty on the Functioning of the European Union (TFEU) States that every person considered to be a citizen of a member State is a citizen of the Union.

European citizenship is meant to overlap with rather than replace national citizenship. The citizenship of the union is not autonomous from the national citizenship; it is a mere reflex of the national ruling on citizenship.

One can question if this derivative citizenship can truly be called a citizenship. First of all, we should say that at this stage of the Union development it would not

be possible to aim for a unified concept of citizenship. Also, one should add that the concept of citizenship has been undergoing great developments lately. For these reasons one can speak about a citizenship here even if we should be careful and add that it is a second level citizenship, different in many ways from the traditional one we already know in well-established States.

In any event, Europe did not follow the American federal example in this topic. In fact, as stated in the 14th amendment of the US Constitution: "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside". This means that first the Americans are citizens of the federal State and then of the State where they reside. Yet this dual form of citizenship is entirely dependent upon the federal law and, as stated in the 14th amendment: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

So, unlike the United States, in Europe one is first a citizen of a member State and then – and because of that – a citizen of the Union. That obviously diminishes the strength of the European citizenship and destroys its autonomy.

It is worth noting in this respect that the usual evolution of the relationship between citizenships in early federation stages is to grow from bottom up, meaning that usually it is determined by the states and then evolves to a federal competence. This was the case in the US before the Civil War and, in a way; it is still the case in Switzerland[284].

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[284] For a very interesting study on federal citizenship see CHRISTOPH SCHÖNBERGER, European Citizenship as Federal Citizenship, some citizenship lessons of comparative federalism (2007), 70.

The derivative nature of the European citizenship is also quite evident when considering its rights. Their scarcity and weakness of protection show that also here – as happens in the definition of the European citizens – the drafters were relying on the member states. The reluctance to create a more robust body seems to have close connections with the previously expressed difficulties in affirming an autonomous European citizenship.

In any event, the drafters did not totally ignore the importance of the doctrine of citizenship as rights. European citizenship is immediately attached, in the TFEU, to a group of rights identified in the Treaty as citizenship rights. Therefore, European citizenship can also be considered a derivative or second level citizenship, given the limited catalogue of rights it includes.

Articles 20 to 24 of the TFEU list the rights included in European citizenship[285]:

a) the right to freely move within the territory of the member states;

b) the right to vote and stand for municipal elections in the member state where the citizen is currently residing given it is not the state of national citizenship under the same rules applicable to the nationals of that member state;

c) the right to vote and stand for elections at the European parliament;

d) The right to benefit from diplomatic protection if in a state where there is no

[285] Armando Rocha points out that the Lisbon treaty introduces the citizens' initiative that may also be considered as an additional citizenship right. See ARMANDO L. S. ROCHA, *Uma Europa em busca de cidadãos* (2012), 100.

diplomatic representation from the citizen's national citizenship.

e) The right to file a petition to the European parliament;

f) The right to file a petition to the Ombudsman;

g) The right to address to any European institution in a language of any member state and get an answer in that same language.

If we compare this catalogue with a typical bill of rights that can be found in any modern Constitution of a democratic state we will immediately conclude that European citizenship rights are somewhat scarce.

These are the rights that the Treaty formally attaches to EU citizenship. Other rights must be considered, especially after the incorporation of the Charter of Fundamental Rights of the European Union in the Lisbon Treaty. Despite this incorporation, the rights the Charter provides for are human rights common to all human beings. That is why I do not consider these rights here as specific citizenship rights.

One additional – but very important – right, with a special connection to immigration within EU borders, which is connected to the right of free movement and establishment, is the right to family reunification within the Union[286]. This right might seem obvious when all family members are EU citizens but can acquire a special significance when spouses or descendants are

[286] STEPHEN H. LEGOMSKY, Rationing Family Values in Europe and America: An Immigration Tug of War between States and Their Supra-National Associations (2011).

not EU citizens. Some of the cases I will analyze in this chapter focus on this specific situation.

One possible explanation for this scarcity of rights could be that the drafters captured the real nature of the citizenship concept, extending human rights and social rights to all human beings and reserving a limited number of rights to citizens. This limited number of rights would be directly connected to the community – freedom of movement and political rights.

Unfortunately, apparently this was not the case. The discrimination against third country nationals who are outside European citizenship relies largely on the decisions of the member states[287]. This happens because European citizenship is a derivative model of citizenship, so what is not protected at the Union level is supposed to have an adequate level of protection at the national level[288].

Admitting that citizens and third country nationals have an adequate level of protection within the member states where they reside or happen to be found, which is a reasonable assumption given the guarantees associated with the admission process in the EU, the scarcity of citizenship rights could be explained by the limited intervention of the EU institutions[289].

The recurrent claims for democratic legitimacy and the lack of it at the EU level deny this assumption[290]. In fact people think that more participation of citizens is

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[287] THEODORA KOSTAKOPOLOU, European Union Citizenship as a model of citizenship beyond the nation state: Possibilities and limits (1998), 164.

[288] RICHARD KUPER, The many democratic deficits of the European Union (1998), 148.

[289] For a critique on the doctrine of subsidiary see RICHARD KUPER, The many democratic deficits of the European Union (1998), 148.

[290] RICHARD KUPER, The many democratic deficits of the European Union (1998), 149.

necessary to legitimate the ever increasing intervention of the EU institutions' decisions in everyday life.

The way these rights are specifically protected also shows a certain weakness of EU citizenship. Even at the Union level it has failed to create a robust group of rights that could, if not be compared to a national citizenship, at least legitimate in a democratic fashion the EU decisions[291].

The provision regarding the right to vote and stand for elections at the European Parliament tries to deal with this problem. Also the provision related to the right to vote and stand in municipal elections of the member states tries to help create a European political community. One should note, however, that these rights are scarce and weak. EU citizens are excluded from voting and standing for elections to national legislative parliaments and executive branches. Here the right to vote is restricted to municipal elections and the European parliament. So there is no right to vote for the major elections. There is a clear contrast with Federal States, as the US example illustrates, where citizens vote for the legislature of their home states as well as in Federal elections for Congress and Presidential elections.

The right to diplomatic protection also has an important restriction. A European citizen can only seek diplomatic protection if he cannot find a diplomatic representative of his national state. So if while in a third country a citizen of a given member state seeks protection at an embassy of any EU member state, protection may be denied if he could seek help at his

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[291] On European citizenship and legitimacy: JOSEPH H. H. WEILER, European Citizenship. Identity and Differentity (1998), 8; JÜRGEN HABERMAS, The European Nation State – Its Achievements and Its Limitations – On the Past and Future of Sovereignty and Citizenship (1997), 112.

own embassy. So when would this work? Only in the event that there was no diplomatic representation of his state and help was needed. In that circumstance help could be sought at the embassy of any other member state. Again, a contrast arises with the US federal system. Here diplomatic protection is a task of the federal Government, not the States. The US embassies represent and confer protection to all the American citizens regardless of the State where they reside.

The rights to address the European Parliament and the Ombudsman are not even exclusive to European citizens. In fact they belong to any natural person and precede the very creation of European citizenship[292]. Herein lies one of the major mysteries of European citizenship. The rights catalogue is scarce since it excludes basic fundamental rights, presumably because those rights are inherent to every human being and not exclusive to citizens[293]. In this very limited catalogue of rights the drafters included two that are not only minor but also inherent to all human beings. The rulings regarding the exercise of these rights confirm this, since they are common to all natural persons.

It seems that little coherence can be found in this catalogue. Or, as J.H.H. Weiler noted, the drafters might have been looking for rights to include in the catalogue that, despite their contribution to the formal creation of the European citizenship, would not weigh

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[292] JOSEPH H. H. WEILER, The Selling of Europe: The Discourse of European Citizenship in the IGC 1996 (1996).

[293] Basic fundamental rights are provided for in the Charter of Fundamental Rights of the European Union. These rights are not specifically connected to the European citizenship. The Charter includes a chapter of rights exclusive of citizens that reproduces the rights provided for in the Treaty.

too much in the overall balance of rights[294]. This means that the drafters felt the need to identify a basic catalogue of rights to compose a bundle of citizenship rights but, given the scarcity of these rights – due to political constraints – they failed to achieve a list of rights typical of a national citizenship.

Even though the creation of European citizenship could be seen as a step forward in the federalist tendencies, the mild model created and the way it differs from the American model tells us that the drafters were not willing or were not able to follow the federalist model of citizenship.

[294] JOSEPH H. H. WEILER, The Selling of Europe: The Discourse of European Citizenship in the IGC 1996 (1996).

## §2. Relationship between national and European citizenship

One of the most controversial issues related to European Citizenship is its relationship with the citizenship of the member States. The derivative form of the European citizenship entails a very close connection with the rules on acquisition and loss of the citizenship of the member States.

A decision related to the granting of citizenship in a particular member State will have a direct impact in all the other member States. Once someone becomes a citizen of a member State he automatically benefits from the catalogue of European citizenship rights, including the freedom of movement and establishment and the associated right of family reunification.

Until the present, though, the common understanding is that harmonization of citizenship laws is not needed Europe wide. It is still considered a reserved domain of the member States as definition of citizenship is still at the core of State sovereignty. If it is clear in International law that more restrictions are being laid on States' sovereignty regarding their freedom to establish citizenship rules, it is even more evident in Europe due to the potential conflict between the citizenship laws of different member States and its impact on European citizenship[295].

One interesting question related to this topic is whether someone would be interested in European citizenship rather than in the citizenship of a member

[295] On examples of soft harmonization and mutual influence see KAROLINA ROSTEK and GARETH DAVIES, The impact of Union citizenship on national citizenship policies (2006).

State. Actually there are citizens of third countries seeking European citizenship and not the citizenship of a particular member State.

This situation happened in a leading and recent case of the Court of Justice of the European Union: the Chen case[296].

Man Lavette Chen, a Chinese citizen was traveling very often to the UK due to family business. She was pregnant and on one of those trips she went to Belfast in Northern Ireland, where she gave birth to her daughter Catherine. She already had a son and was concerned about the Chinese second child policy.

At the time Ireland had a purely "ius soli" rule, meaning the birthright citizenship[297]. After little Catherine was born, her mother filed a claim with the UK immigration authorities to get a residence permit to live there. She claimed Catherine was Irish and for that reason, a citizen of the European Union.

Being a European citizen, Catherine was entitled, under the right to free movement and establishment provided for in the EU Treaty, to live in any other EU member State. Obviously little Catherine was entirely dependent on her mother and her family and claimed, under the provisions of a European directive, the right

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[296] Case E.C.J. C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department; JEAN-YVES CARLIER, Case C-200/02, Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department (2005), 1127.

[297] Catherine was granted Irish citizenship even though she was born in Northern Ireland, part of the United Kingdom, because, at the time, article 6 of the Irish Nationality and Citizenship Act 2004 stated that "every person born in the island of Ireland is entitled to be an Irish citizen". The law was changed after a referendum, heavily influenced by the outcome of the Chen Case (that was still pending a court decision at the time of the referendum in 2005), and the Irish Constitution and citizenship law were amended to eliminate birthright citizenship.

to live in the UK with her family. They also proved to have sufficient financial means so they would not be a burden for the British social security system.

The British immigration authority refused to grant the residence permit to Man Lavette Chen on the grounds that the only purpose the child was born in Ireland was to get the Irish citizenship and through that action the right to reside in the UK. There was arguably "abuse of law", meaning that the mother was trying to circumvent the law, trying to get out of it an effect that was not provided for in the Irish citizenship rules. In fact, according to the British authorities, the Irish citizenship law did not aim to allow third countries' nationals to, through the Irish citizenship, gain access to residence rights for the newborn and family in the EU neighboring countries.

The arguments used by the British authorities showed that the member States were convinced of the supremacy of the national citizenship and that the third countries' nationals would probably not be interested in getting the European citizenship without really caring about the underlying national citizenship. And they considered that to be an illicit advantage.

The case was referred to the Court of Justice of the European Union that recognized that Catherine had the right to live with her family in the UK. The Court, however, did not take advantage of this case to try to build the autonomy of the European citizenship. Instead it followed the traditional theory of the domestic reserved domain in international law, saying that it is up to each State to decide on citizenship matters, so if Ireland decided to grant citizenship to little Catherine, Britain had no authority to question that granting. This means that the UK should accept Irish authority to establish its own citizenship rules with all the attached consequences, such as the EU citizenship and the rights

it entails (freedom of movement, establishment, family reunification).

In order to reach that conclusion, the Court referred to a previous leading case on the impact of European citizenship on the national citizenship, the Micheletti decision[298].

Mário Vicente Micheletti was born in Argentina and had both Argentinean and Italian citizenships. In 1989 he claimed a temporary residence permit from the Spanish authorities, having shown his Italian passport. Shortly before his visa expired he claimed a permanent residence permit to be able to stay in Spain and work as a dentist. That claim was denied by the Government of Cantábria. According to Spanish law, in cases of dual citizenship, preference is given to the citizenship of the place of residence, which was Argentina in Micheletti´s case.

Since he was considered Argentinean by Spanish law, Micheletti could not benefit from the provisions of the European citizenship.

The Court decision in this case was as follows: "under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty"[299].

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[298] Case E.C.J. C-369/90, M.V. Micheletti and others v. Delegacion del Gobierno en Cantabria; JESSURUM D´OLIVEIRA, Case C-369/90, M.V . Micheletti and others v. Delegacion del Gobierno en Cantabria (1993), 623.

[299] Case E.C.J. C-369/90, M.V. Micheletti and others v. Delegacion del Gobierno en Cantabria.

It is worth noting that in these cases the dispute was not exactly on the ability of the member states to define citizenship internally but on the external consequences of that decision, especially in the context of the European citizenship rights. For that matter it is not so different from the Nottebohm decision and the classical international citizenship law among states. The difference in the EU is the level and impact of those consequences, given the close connections between EU and national citizenship.

This decision is referred to as if it supports the theory of the State reserved domain over citizenship[300]. In fact, according to this theory it is entirely up to a State to decide on internal rules of granting citizenship.

However one should add that this freedom is limited by international law and, in the case of the EU, by community law. The same conclusion was reached in the previously mentioned Chen case. Again the Court said that it was up to Irish law – and not the British authorities – to decide what rules of Citizenship would apply in that case. So Britain would have to comply with whatever rules – in respect of the international and community law – Ireland decided to adopt.

I argue that this decision opens the way to a new interpretation of the international boundaries for citizenship rules. Unlike the traditional view – relying on State freedom with regard to citizenship rules – this decision reaffirms the existence of limits to this freedom deriving from the international law and from the community law. In fact, the basic conclusion of the Micheletti decision is that the Spanish law should not be applicable to Micheletti because the application of that law would breach the community law and, more

[300] JESSURUM D´OLIVEIRA, Case C-369/90, M.V. Micheletti and others v. Delegacion del Gobierno en Cantabria (1993), 634.

specifically, Micheletti´s right to establish as a dentist in Spain.

I will conclude by reinterpreting the Court decision in the light of recent developments in international and European citizenship law stressing the existence of boundaries or limits to the State freedom to establish citizenship rules. What kind of limits are these?

We can generally say, in accordance with international and European law, that a State cannot grant its own citizenship if:

a) There is no serious reason to grant the citizenship;

b) There is no effective link between the person and the State; or

c) It results from "abuse of law".

These boundaries correspond essentially to the limits already identified in International citizenship law. The first two have been well established for a long time following Nottebohm and the latter can be clearly identified in the CJEU Chen decision.

The granting of citizenship would lack serious reasons if a State decided to grant citizenship arbitrarily. Concerns about illegal migration networks, drug and gun traffic and terrorism increase the need for surveillance regarding the seriousness States attach to granting citizenship. Arbitrary concessions of citizenship for no apparent reason may hide illicit reasons connected to the protection of these networks. Developing countries are particularly exposed to this danger.

The theory of the effective link dates back to the Nottebohm case in the International Court of Justice in 1955. In this decision the Court Stated that a unilateral grant of citizenship by Liechtenstein could be disregarded by Guatemala, the country where Nottebohm was living and where he kept his property.

From that decision on it was assumed by the international community that an effective link between the citizen and the State could be demanded in order to oblige other countries to recognize the citizenship status thus granted.

A situation of "abuse of law" may occur when someone tries to circumvent a certain citizenship law to get benefits not intentionally provided by that law. According to the British authorities that was the case in "Chen" as the mother was trying to obtain a residence permit in the UK for the whole family through the Irish citizenship law.

Despite recent developments, the doctrine of the exclusive domestic jurisdiction is still prevalent in international law. The cases of accepted interference of international law in the domestic sovereignty over citizenship are still limited[301].

The case is different if we look at European citizenship. Here the potential conflicts between national and European citizenship are many. According to Gerard-René De Groot[302], member State citizenship legislation can virtually be contrary to the European basic principles of solidarity among Member States and free movement.

The historic relations European countries maintain with former colonies may justify the temptation to create special bonds leading to citizenship. This has happened on several occasions in recent British

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[301] SATVINDER JUSS, Nationality Law, Sovereignty and the Doctrine of Exclusive Domestic Jurisdiction (1994), 219.

[302] GERARD RENÉ DE GROOT, The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship (1998), 123; Id., Towards a European Nationality Law (2004), 12.

history[303]. It has also been the case in Portugal, where affirmative action made it easier for citizens of Portuguese-speaking countries to gain access to citizenship.

That said, this does not seem to be an illegitimate action of the State. Acting in a matter of State sovereignty, the States decide to grant or ease the granting of citizenship to a part of a population with whom the State maintains close connections. It could also be justified by the natural cultural and linguistic bond already existing.

What if a Member State decides to grant citizenship to a substantial part of the population of a non EU country? [304] That would have a direct and significant impact on other member States. That was the basic Irish fear that may well explain the dramatic numbers in the referendum that refused the birthright citizenship criteria for granting citizenship, preventing cases such as "Chen".

Although current interpretations of the Court's decisions in "Chen" and "Micheletti" still point to the conclusion that citizenship is a matter of national jurisdiction, Ireland may have been "de facto" harmonizing citizenship law. To avoid the flow of people trying to get through the "Irish open window" to European citizenship, Ireland closed the door to the birthright citizenship as a whole.

Again, within the doctrine of exclusive domestic jurisdiction it was as legitimate for Ireland to establish the birthright citizenship as it was to eliminate it. What

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[303] GERARD RENÉ DE GROOT, Towards a European Nationality Law (2004), 12; SATVINDER JUSS, Nationality Law, Sovereignty and the Doctrine of Exclusive Domestic Jurisdiction (1994), 219.

[304] For an interesting example regarding Dutch law: GERARD RENÉ DE GROOT, Towards a European Nationality Law (2004), 12.

we cannot ignore is the influence these facts may have had on the decision to change the law.

This means that the citizenship law that other member States may approve is not irrelevant for the European member States, given that it will have a direct impact in their countries because of the European citizenship rights.

Solidarity might be at stake if other member States were to suffer the direct impact of a decision on citizenship of another member State.

## §3. In-between national and transnational citizenship: the groundbreaking evolution in Court of Justice of the European Union case law

After Micheletti and Chen, there was a significant evolution in the decisions of the CJEU that led some scholars to identify a revolution in EU citizenship law[305].

A first decision was reached in Case C-135/08, Janko Rottmann v. Freistaat Bayern[306].

Janko Rottmann was born in Graz (Austria) and was originally, by birth, an Austrian.

In 1995 he transferred his residence to Munich, after being heard by the criminal court of Graz following an investigation concerning him which had opened on account of suspected serious fraud on an occupational basis in the exercise of his profession, which he denied.

In February 1997 the criminal court of Graz issued a national warrant for his arrest.

Rottmann applied for German nationality in February 1998. During the naturalisation procedure he failed to mention the proceedings against him in Austria. The naturalisation in Germany had the effect,

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[305] DIMITRY KOCHENOV, A Real European Citizenship. A New Jurisdiction Test. A Novel Chapter in the Development of the Union in Europe (2011), 56; MICHAELA HAILBRONNER and SARA IGLESIAS SÁNCHEZ (2011), 498-537; and the very interesting collective discussion promoted at the European University Institute on Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law? (2011).

[306] Case C-135/08, Janko Rottmann v. Freistaat Bayern.

in accordance with Austrian law, of causing him to lose his Austrian nationality.

In August 1999 the city of Munich was informed by the municipal authorities of Graz that a warrant for Rottmann's arrest had been issued in Graz. In the light of those circumstances, on 4 July 2000 the Freistaat Bayern withdrew the naturalisation with retroactive effect, on the grounds that Rottmann had not disclosed the fact that he was the subject of judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception.

Sitting as the court of second instance, the Bayerischer Verwaltungsgerichtshof held, by judgment of 25 October, 2005, that the withdrawal of the applicant's naturalisation was compatible with German law, even though the effect of that withdrawal, once definitive, would be to render the person concerned stateless.

The German Court referred the case to the CJEU for a preliminary ruling on the following grounds:

"*(1) Is it contrary to Community law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?*

*(2) [If so,] must the Member State ... which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception,*

*having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) …, or is the Member State … of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?*"

A first – and decisive – question addressed by the Court relates to the Court's competence to rule in this case. In fact, it could be argued that this was a situation of a "*German living in Germany stripped of German nationality in a German legal process: typically an internal case, a situation in which all of the elements are enclosed in one member state, which Union law has no say in, and which must lead to the inadmissibility of the preliminary questions*"[307].

The Advocate-General, Poiares Maduro, addressed this question cautiously in his opinion, arguing that "*the presence of a foreign element cannot legitimately be disputed on the ground that, German nationality once obtained, the legal relationship of the applicant in the main proceedings with the Federal Republic of Germany became that of a national of that State and that, in particular, withdrawal of the naturalization is a German administrative act addressed to a German national residing in Germany. That would be to ignore the origins of Mr. Rottmann's situation. It was by making use of the freedom of movement and residence associated with Union citizenship which he enjoyed as an Austrian national that Mr. Rottmann went to*

[307] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 140.

*Germany and established his residence there in 1995, in order to initiate a naturalization procedure*".

Thus the AG did not affirm the competence of the Court on the basis of EU citizenship nature *per se* but because of the transnational relevance of the case. Contrary to what Jussurum d`Oliveira has written about this, Poiares Maduro saw several cross border elements. In fact, as Maduro rightly observes, the only reason why Rottman lost his Austrian citizenship and then qualified to obtain German citizenship was that he was exercising the freedoms provided for in the Treaty which constitute the fundamental rights embedded in the EU citizenship status.

In that sense, Maduro goes back to what De Groot had said years before when he argued that national rules on acquisition and loss of citizenship could breach the Treaty if proven to be contradictory to fundamental EU principles or freedoms[308]. Maduro eloquently says "*thus, a State rule providing for loss of nationality in the event of a transfer of residence to another Member State would undoubtedly constitute an infringement of the right of movement and residence conferred on citizens of the Union by Article 18 EC*".

The Court went further than the AG's opinion in one part of the decision that I consider of utmost importance. The Court said that "*it is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that*

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[308] GERARD RENÉ DE GROOT, The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship (1998), 123; Id., Towards a European Nationality Law (2004), 12.

*he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law*".

The ground-breaking effect of this decision is that, without ignoring that citizenship still falls within the competence of the member states, any national decision that interacts with the EU citizenship status – and virtually all of them do, at least potentially – is considered by the Court to fall, *by reason of its nature and its consequences, within the ambit of European Union law*".

That means that the Court extended its competence to all questions arising from internal decisions on citizenship as long as they interfere with the EU status and fundamental rights and freedoms.

The Court had had the opportunity before to intervene in cases where national citizenship decisions were at stake – for instance, in the cases of Micheletti or Chen that I described above – but had never before affirmed its competence over citizenship matters in such a broad and unrestricted way. In fact the Court not only affirmed the competence of EU Law over citizenship cases, even when there is no cross border movement, but also recognized the existence of a principle of EU Law – the principle of proportionality – that imposes limitations – both positive and negative – on member states´ sovereignty over citizenship. In fact, as the Court decided and I will later describe, Germany could withdraw citizenship based on deception, but Austria should have considered that withdrawal when deciding whether or not to reattribute Austrian citizenship to Rottman. The principle of proportionality works here as a double limitation: to the withdrawing

country (Germany) and to the reattributing country (Austria).

The Court went on to address the question of whether withdrawing citizenship on the grounds of deception is a violation of international and EU law.

The withdrawal of citizenship in cases of fraud is generally accepted by international law[309]. This is recognized in the Convention on the Reduction of Statelessness. Article 8(2) provides that a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud. Likewise, Article 7(1) and (3) of the European Convention on nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality has been acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to that person. It is therefore in line with the general principle of international law that no one is arbitrarily to be deprived of his nationality, that principle being reproduced in Article 15(2) of the Universal Declaration of Human Rights and in Article 4(c) of the European Convention on nationality. The Court concluded that when a State deprives a person of his nationality because of his acts of deception, which have been legally established, that deprivation cannot be considered to be an arbitrary act.

Therefore, the decision of the Court regarding the loss of citizenship and its conformity with international law was that "*a decision withdrawing naturalisation because of deception corresponds to a reason relating*

[309] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 141.

*to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality*".

The Court goes back to Micheletti, Kaur and Chen cases to affirm that "*the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law ( Micheletti and Others , paragraph 10; Mesbah , paragraph 29; Case C-192/99 Kaur [2001] ECR I-1237, paragraph 19; and Zhu and Chen , paragraph 37)*".

According to AG Maduro´s opinion, "*at the present time, the Court has not yet sufficiently clarified the scope of that proviso. It has merely inferred from it the principle that a Member State must not restrict the effects of the grant of the nationality of another Member State by laying down an additional condition for recognition of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty*". Following that opinion, the Court takes here the opportunity to revisit the very important proviso of the Michelleti decision that I have interpreted above. According to the Court, "*member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law*". Here the Court adds, reinterpreting that fundamental proviso in the light of the Rottman case that "*the proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights*

*conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law*".

The Court concludes that "*it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality".*

As Jessurum d´Oliveira points out in a critical tone, "*the A.G. had not devoted a single word to the principle of proportionality. He was of the opinion that the revocation in this case was not a violation of any Community rule. It is the Court's own invention to colour in its long-held stipulation – the member states' 'reserved domain' in the area of nationality law – with the proportionality principle*"[310].

That is why this is the most important part of the decision, deemed as *avant gard* by some scholars[311].

The Rottman decision is an important part of a long-running debate on EU citizenship law that sets those who read CJEU decisions as a reinforcement of the *reserved domain* doctrine[312] against those who see,

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[310] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 144.

[311] GERARD RENÉ DE GROOT and ANJA SELING, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note 2 - The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters (2011), 150.

[312] H. U. JESSURUN D'OLIVEIRA, Nationality and the European Union After Amsterdam (1999).

in cases like Micheletti or Chen, a clear limitation deriving from EU law on national decisions over citizenship[313].

The reactions to Rottman were extreme, even from those who have long identified this trend. Gerard René de Groot and Anja Seling qualified the decision as judicial *avant-gardism,*[314] Dimitry Kochenov said that "*although confirming the general trend in the recent development of EU law, characterised by the shift from dual to co-operative federalism, which stands for 'a philosophy where sovereignty is shared' and no 'reserved domains' exist, Rottmann is fundamentally innovative in a number of important respects*"[315]. Kochenov adds that "*Rottmann is the first case to hold unequivocally that the field of nationality regulation is not a 'reserved domain' for the Member States where EU law does not apply. In fact, clearly, there are no such reserved domains at all, since EU competences are goal oriented and interpreted teleologically, which makes immunity of particular fields of regulation to EU law impossible*"[316].

At the other extreme, Jessurum d´Oliveira says that "*the Court is persisting in its judicial error. The*

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[313] GERARD RENÉ DE GROOT, *The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship* (1998), 123; Towards a European Nationality Law, 8.3. Electronic Journal of Comparative Law (2004).

[314] GERARD RENÉ DE GROOT and ANJA SELING, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note 2 - The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters (2011), 150.

[315] DIMITRY KOCHENOV, Annotation, Case C-135/08, Janko Rottmann v. Freistaat Bayern (2010), 1836.

[316] DIMITRY KOCHENOV, Annotation, Case C-135/08, Janko Rottmann v. Freistaat Bayern (2010), 1838.

*question of whether the European Union has authority over the organization of the member states' nationality law not only leads to divisions in the doctrine, but also among the institutions of the Union. In its interventions in the cases submitted to the Court, and again in the Rottmann case, the Commission has systematically taken the point of view, despite the Court's case-law, that nationality law is a matter exclusively for the member states. In its answers to written questions from the European Parliament, as well, the Commission has always refused to make a substantial statement on member states' nationality law, because it claimed to lack the competence to do so*".

I do not think that the Rottman decision represents such a bold change in relation to what the Court said before about the relationship between EU citizenship and national member states' citizenship. In fact only a narrow reading of the preceding cases could lead to the conclusion that this decision represents some kind of revolution in EU citizenship law. As Kochenov acknowledges, this decision confirms the "*general trend in the recent development of EU law*"[317].

The interpretation of the Micheletti and the Chen cases that I have outlined above shows that my true understanding of these cases is that they were the beginning of a revolution in EU citizenship law.

The fundamental proviso "having due regard to community law" had to mean something. As De Groot has argued at length, it meant that a violation of EU fundamental principles and freedoms by a national citizenship law could be reviewed by the Court and declared contrary to EU law. It was just a matter of when and how the question would arise.

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[317] DIMITRY KOCHENOV, Annotation, Case C-135/08, Janko Rottmann v. Freistaat Bayern (2010), 1836.

It was also possible to speculate about different principles and freedoms that could potentially be breached by a national citizenship rule. What the Court now did was to explicitly state one of these principles: proportionality.

It is very important to recall that the Court affirmed explicitly that the principles highlighted in this decision are applicable both to acquisition and loss of citizenship: "*the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality*". This *obiter dicta* is justified by the need to address the duties of Austria in this process, but may well be used in other cases. In fact, aware of the importance of this case and of future developments, the Court wanted to clarify that the principles identified do not only apply to situations of loss of citizenship. Such a narrow reading would immediately follow had the Court failed to include such a sentence.

The principle of proportionality seems an adequate proposition to regulate citizenship cases, especially related to the loss of citizenship, since it demands a careful proportionality test to assess whether or not the decision is proportionate to the facts. It means, in the present case, that withdrawing citizenship on the grounds of a fraudulent action related to the concealing of a relevant fact, such as a criminal procedure pending upon the person, is adequate in terms of the proportionality test. It would probably not be the case if there was a failure to report a speeding ticket or another minor misdemeanor. The Court affirmed that any decision on the withdrawal of citizenship – but also, very importantly, on acquisition – should comply with the strict scrutiny of a proportionality test.

The Court established precise rules related to this proportionality test. As Jessurum d´Oliveira points out, "*for completing this Union law proportionality test, the Court provides a number of quite concrete instructions*".

The Court does this in paragraph 56: "*having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality*".

Several elements should be considered: i) consequences of the decision to the person concerned; ii) consequences to the members of the family; iii) justification in relation to the gravity of the offence committed; iv) lapse of time between naturalization and withdrawal; and v) possibility of the person recovering the original citizenship.

Underlying this crucial proportionality test is another principle: protection of expectations. AG Maduro very rightly identified this principle: *as regards the withdrawal of naturalisation at issue in this case, some might invoke against it the principle of the protection of legitimate expectations as to maintenance of the status of citizen of the Union. However, it is not clear in what respect that principle has been contravened, in the absence of any expectation meriting*

*protection on the part of the person concerned who has provided false information or committed fraud and has thus obtained German nationality illegally. More especially because, as we have seen, international law authorises the loss of nationality in cases of fraud, and Union citizenship is linked to possession of the nationality of a Member State*. In fact this shows that while most authors say that the AG's opinion missed the proportionality issue[318], AG Maduro actually set the tone for the articulation of this principle by mentioning *the principle of the protection of legitimate expectations*.

Although it is clear that the action was unlawful, the proportionality test must take into consideration factors such as the consequences for the person and the family and the time elapsed. In this sense legitimate expectations does not mean legal or lawful expectations, but rather expectations that the law must accommodate[319]. I will use this argument later to show

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[318] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship (2011), 144.

[319] Arguing that this principle will have significant implications on the Dutch nationality law: "the principle of the protection of legitimate expectations which Advocate General Maduro also potentially views as being capable of restricting the legislative power of the Member States in the sphere of nationality (para. 31) cannot be disregarded by the Dutch authorities either. Until now, the courts in the Netherlands repeatedly ruled that the protection of legitimate expectations is not a ground for acquisition of Dutch nationality. It is likely that this view can no longer be maintained. To disregard the general principles as mentioned above, like the principle of proportionality, the principle of equal treatment and the principle of the protection of legitimate expectations will not be tolerated in Luxembourg. It can be concluded that Rottmann urgently requires amendments to be made with regard to Dutch rules governing the loss of nationality in order to prevent long court proceedings and preliminary ruling questions", see GERARD RENÉ DE GROOT and ANJA SELING, The consequences of the Rottmann judgment on Member State autonomy – The Court's avant-gardism in nationality

the trend towards a right to a specific citizenship and the importance of expectations in that context. The time elapsed is also an important factor, related to the expectations principle, since it shows residence and the relevance of the said expectations. It is comparable to the acquisition of property through adverse possession[320]. I will come back to this later.

Despite the enthusiastic reaction to this decision, Kochenov is very critical of the application of the proportionality principle in a case related to the withdrawal of citizenship. According to this author, "*the application of proportionality in the cases of statelessness seems more of a farce, indicating the dangerous limitations of thinking about rights in Europe*". And, he adds, "*all in all, it is regrettable that the CJEU chose proportionality – 'a specific test which pretends to balance values avoiding any moral reasoning'. There is no doubt that the application of proportionality deprives nationality, in the context of imminent statelessness, of the weight it deserves and tends to ignore the fundamental potential it has in terms of rendering human rights and the most basic protections unusable, i.e. erasing a person*".

However, it is understandable that the final solution of this case might sound disappointing since a decision that is deemed to be historical ends up rendering Rottman potentially stateless.

Yet the importance of the decision cannot always be assessed by its final result. The final decision in

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matters in Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law? (2011).

[320] TIMOTHY J. LUKES and MIHN T. HOANG, Open and Notorious: Adverse Possession and Immigration Reform (2008), 31; MONICA GOMEZ, Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States (2007), 110–15.

Chen is certainly more fortunate than that in Rottman but neither of them will remain as the key factors in these two CJEU cases.

A proportionality test certainly allows the Court to assess different aspects and weigh up their relative importance. Such a weighing up was not possible in the Rottman case, at least in the prevailing narrow visions of it. In that scenario, the court had no alternative but to render Rottman stateless, not after its own proportionality assessment but on the grounds of the reserved domain doctrine or, even worse, by declining competence to review the case due to the purely internal nature of the situation.

In that sense, this case seems to be an important leap forward, essentially because it identifies an important principle – proportionality – that was not evident before and that the states will now have to comply with.

I will make a final point on this case just to underline that these principles are also applicable to citizenship acquisition or naturalization rules. In fact the question is also pending in this case because it is not clear if Rottman will become stateless. On this issue, which is the second question the German court asked, the Court said: "*in this instance, it is to be noted that the withdrawal of the naturalisation acquired by the applicant in Germany has not become definitive, and that no decision concerning his status has been taken by the Member State whose nationality he originally possessed, namely, the Republic of Austria*". And it added: "*the Court cannot, however, rule on the question whether a decision not yet adopted is contrary to European Union law. As the Austrian Government maintained at the hearing, the Austrian authorities will possibly have to adopt a decision on the question whether the applicant in the main proceedings is to*

*recover his nationality of origin and when that decision has been adopted the Austrian courts will, if necessary, have to determine whether it is valid in the light of the principles referred to in this judgment*".

However, it is worth noting the opinion of AG Maduro on this: "*as regards the restoration of Austrian nationality, Community law does not impose any such obligation, even though, failing such restoration, the applicant in the main proceedings remains stateless and, therefore, deprived of Union citizenship. (...) Admittedly, the view could be taken that, since the withdrawal of German naturalisation has retroactive effect, Mr. Rottmann has never had German nationality, so that the event triggering the loss of Austrian nationality never took place. Consequently, he would have a right to automatic restoration of his Austrian nationality. However, it is for Austrian law to decide whether or not that reasoning should apply. No Community rule can impose it. The position would be otherwise only if Austrian law already provided for such a solution in similar cases, and, in that case, on the basis of the Community principle of equivalence*".

There is a very interesting attempt by the AG, almost certainly because a resulting statelessness situation was not desirable to the Court, to point to an ingenious yet rigorous legal solution to avoid the undesirable conclusion.

Where I disagree and, I believe, the Court does too, is that no community rule can impose the granting or the restoration of citizenship. In fact, when the Court, following the AG's opinion, expressly states that "[...] *and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality*", the Court is saying that

Austria must comply with the same principles when deciding whether or not to restore Austrian citizenship.

In fact, this tiny detail in the whole decision is probably the most important yet unidentified one: for the first time the Court affirmed a positive limitation on States to grant citizenship. When deciding to grant or restore citizenship, States must comply with community law. I will not qualify this proviso for the moment but I will, as I did in Micheletti, predict significant evolutions out of it.

Another very important and recent CJEU decision, also perceived as a revolution in EU citizenship law, is the Zambrano case, and the decision of 8 March 2011[321].

On 14 April 1999, Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá, applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

By a decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order sent to them included a non-refoulement clause stating that they should not be sent back to Colombia in view of the civil war in that country.

On 20 October 2000, Ruiz Zambrano applied to have his situation regularized. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasizing his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the

[321] Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM).

significant post-traumatic stress syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

That application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension.

Since 18 April 2001, Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

On 1 September 2003, Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognize Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

The order for reference further indicates that, at the time of his second child's birth, Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

On 9 April 2004, Mr. and Mrs. Ruiz Zambrano again applied to have their situation regularized, putting forward as a new factor the birth of their second child.

Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr. and Mrs. Ruiz Zambrano lodged an application to take up residence in their capacity as ascendants of a Belgian

national. On 13 September, 2005 a registration certificate was issued to them provisionally covering their residence until 13 February, 2006.

Ruiz Zambrano's application to take up residence was rejected.

From the lodging of his action for review of the decision rejecting his application for residence in March 2006, Ruiz Zambrano held a special residence permit valid for the entire duration of that action.

In the meantime, on 10 October 2005, Mr. Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected.

In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr. Ruiz Zambrano's employer, Ruiz was found to be at work. He had to stop working immediately. The next day, Mr. Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

The application lodged by Mr. Ruiz Zambrano for full-time unemployment benefits was rejected.

On 19 November, 2007, Ruiz Zambrano brought an action to the Belgian Court based on the inexistence of the 'legal engineering' of which he had been charged, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation.

The Belgian court referred the case to the CJEU for a preliminary ruling, asking the following:

"*1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in*

*conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?*

*2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [ Zhu and Chen ], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?*

*3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of*

*a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [ Zhu and Chen ] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?*"

The Court, in an extremely laconic decision, again made history by the way it considered the questions referred to it and answered them.

First of all it is worth noting several similarities between this case and the Chen case. This was noted by Zambrano in his arguments and also by the Court and several commentators. As in the Chen case, Zambrano was claiming to have a right of residence in an EU member state due to the fact that he and his wife were ascendants of EU citizens that were, at the time, totally dependent on them.

Yet there are also some aspects that do not perfectly coincide with the facts in Chen. The most ground-breaking parts of the decision are probably related to these aspects.

The first one has to do with the purely internal nature of the situation. While in Chen the situation was clearly cross-border since there was no relationship whatsoever between Catherine and her family and Ireland and the petition was to reside in the UK, in Zambrano it seems a purely internal situation.

The only transnational connections are between Colombia, a non EU member state and Belgium. All the relevant facts –the Zambranos' residence, the work, the birth, the nationality – were attached to Belgium soil, according to the law of Belgium[322].

This was brought to the attention of the Court by all the member states represented by agents in the judgment. The Court said that "*all governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr. Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings*".

In response to this, Zambrano argued that "*the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State*".

The Court candidly decided that "*Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by*

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[322] On Zambrano and family reunification see STEPHEN H. LEGOMSKY, Rationing Family Values in Europe and America: An Immigration Tug of War between States and Their Supra-National Associations (2011), 829.

*virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42)*".

In fact it would be hard for the Court to decide otherwise. One of the most important aspects in Rottmann was the decision that the situation – i.e. EU citizenship – fell within the scope of EU law by "reason of its nature and consequences"[323].

In contrast with the extremely short Court decision, the AG in this case, Sharpston, delivered a thorough and comprehensive opinion[324]. AG Sharpston justifies that there is no need for cross-border movement to apply EU law in this case, on a very interesting academic example: "*if one insists on the premiss that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Suppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany. They would then have received services in another Member State. Were they to seek to claim rights arising from their 'movement' it could not be suggested that their situation was 'purely internal' to Belgium. Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France? If the family, having been obliged to leave Belgium and indeed the European Union, were to seek refuge in, say, Argentina, Diego and Jessica would be*

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[323] DIMITRY KOCHENOV, A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe (2011), 83.

[324] ANJA LANSBERGEN and NINA MILLER, European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l' emploi (ONEM) (2011), 290.

*able, as EU citizens, to invoke diplomatic and consular protection from other Member States' missions in that third country. They could seek access to documents and write to the Ombudsman. But they would not, on this hypothesis, be able to rely on their rights as citizens of the Union to go on residing in Belgium. It is difficult to avoid a sense of unease at such an outcome. Lottery rather than logic would seem to be governing the exercise of EU citizenship rights*".

The opinion of the AG in this case, confirmed by the Court, directly contradicts the opinion of Jessurum d´ Oliveira in his comment on the Rottmann case, in what he predicted would be one the most difficult outcomes to deal with. As d´Oliveira said in his comment, "*if a Dutch national who has lived and worked in Greece and Germany moves to the United States and voluntarily becomes a naturalised US citizen and thereby loses his Union citizenship, EU law has nothing to say about it. The broadly formulated operative part of the judgment admits a development that will, so I surmise, also bring this type of cases under the spell of EU law*"[325].

What the Court said in Rottmann and clearly reaffirms in Zambrano is that EU law has something to say whenever the exercise of EU citizenship rights and liberties are at stake, regardless of the internal nature of the situation or whether third countries are involved.

As AG Sharpston rightly puts it, "*the Court's reasoning in Rottmann, read in conjunction with its earlier ruling in Zhu and Chen, may readily be transposed to the present case (...)Moreover, like Catherine Zhu, Diego and Jessica cannot exercise their*

[325] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 147.

*rights as Union citizens (...)the facts of this case do not constitute a purely internal situation*".

It is therefore clear, both for the AG in this case and for the Court, that as long as EU citizenship rights might be affected by a national court decision related to the EU citizenship status and its relationship with national citizenship, EU law has a say in it. It is not an invention in this case; it is, rather, an evolution than can clearly be identified here in the combination of the rulings in the Chen and Rottmann cases.

The decision of the Court immediately followed this conclusion, without any further considerations: "*Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen*".

In her thorough opinion, AG Sharpston addressed two additional issues not regarded by the Court: proportionality and reverse discrimination and fundamental rights. Given the importance to my overall claim I will comment on the first two.

The reference to the proportionality principle is totally justified given the importance that the principle played in the Rottman case. According to AG Sharpston, "*in assessing proportionality in the present case, the national court will need to take into account the fact that Mr. Ruiz Zambrano worked full time for nearly five years for Plastoria. His employment was declared to the Office national de la sécurité sociale. He paid the statutory social security deductions, and*

*his employer paid the corresponding employer's contributions. He has thus in the past contributed steadily and regularly to the public finances of the host Member State. In my view, these are factors that point to the conclusion that it would be disproportionate not to recognise a derivative right of residence in the present case. Ultimately, however, the decision is one for the national court, and the national court alone*".

Although the Court did not address the proportionality principle, as the decision resulted directly from the application of Article 20 TFEU, it is worth recalling the opinion of the AG. AG Sharpston did nothing more than apply to this case the proportionality doctrine adopted in Rottman, by running the proportionality test on the facts of the case.

The exercise is very interesting and led the AG to the conclusion that it would be *disproportionate not to recognise a derivative right of residence in the present case.* The factors that were considered in this test were the time Zambrano had worked for a Belgian company, the fact that his employment was not concealed from the Belgian authorities, and also his payments to the social security and tax departments.

Again, there was no direct concern with the legality of his presence, but rather with the expectations raised. In this case, the conclusion of the AG was the one I have just described.

Another concern of the AG was reverse discrimination. Here she addressed the Court directly, urging it to deal openly with the issue of reverse discrimination, although acknowledging that a radical change in the entire case law on reverse discrimination would not happen overnight.

According to Miguel Poiares Maduro, reverse discrimination "*occurs when a Member State is required by EC law to confer rights on the nationals of other*

*Member States which it does not extend to its own nationals therefore giving rise to discrimination against the latter*"[326]. It derives from the general rule that prohibits discrimination based on nationality[327].

When applied to EU citizenship, reverse discrimination has a restrictive effect. As Dimitry Kochenov asserts, "*the general rule is simple: those who do not make use of the rights offered by Community law in the majority of cases do not find themselves within its scope. The CJEU has been clear on this issue: "citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law." Only those who move enjoy the full array of rights. In other words, in any situation where a cross-border element is absent, European citizens are not protected by the rules of Community law*".

Or, in the eloquent words of Anja Lansbergen and Nina Miller "*reverse discrimination occurs when a 'mobile' EU citizen benefits from more favourable rules under European Union law than a 'static' EU citizen does in his own member state. For example, a European citizen who moves to another member state with a third country family member will benefit from European Union free movement rules under the Citizens' Rights Directive, which lay down the conditions under which third country national family members are entitled to*

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[326] MIGUEL POIARES MADURO, The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination (2000), 118. See also ELEANOR SPAVENTA, Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects (2008), 30.

[327] SOFIA OLIVEIRA PAIS, Todos os cidadãos da União Europeia têm direito de circular e residir no território dos Estados-Membros, mas uns têm mais direito do que outros… (2010), 484-489.

*join European citizens in the host member state in the absence of the application of national immigration law at the point of entry into the Union*"[328].

It is an undesirable phenomenon that occurs due to the peculiar nature of the EU and of EU citizenship, in between national and transnational citizenship.

The Court has been trying to cope with the phenomenon by stretching the rights in order to include other persons that would not be included *ratione materiae*.

Nothing in these recent Court decisions prevent reverse discrimination from happening. That is probably why AG Sharpston urges the Court to solve the problem by addressing the issue of reverse discrimination directly, in the citizenship context. Therefore she suggested to the Court "*that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law*".

This might be an interesting solution to try to avoid the unnecessary stretching that the Court often engages in. The Court did not follow the opinion and avoided addressing the reverse discrimination issue.

I believe the solution is to resolve the question at its roots, by overcoming the peculiar nature of EU citizenship. I would agree with Michaela Hailbronner and Sara Iglesias Sánchez when they say that "*the only way for the European legal order to end this*

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[328] ANJA LANSBERGEN and NINA MILLER, European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM) (2011), 290.

*phenomenon of reverse discrimination – independently from the constitutional solutions that the Member States might adopt – is to elevate the rights to the status of federal rights. This is what has been achieved by the Court in Rottmann – elevating the protection against arbitrary deprivation of citizenship to the federal level- and in Ruiz Zambrano, elevating the right of residence – as physical presence – to the category of federal right (and extending therefore a privilege that was previously only enjoyed by movers under the Chen jurisprudence)*"[329].

As a general comment on the Zambrano case, I would say that, despite its importance and revolutionary nature, the outcome of the case could easily have been foreseen, especially after Rottman.

In its essential aspects the case is not very different from Chen. As in Chen, the parents of children who were EU citizens claimed the right to live in an EU member state territory as a citizenship residence derivative right.

While in Chen the UK disputed the abuse of law that Man Lavette employed in an attempt – which was ultimately successful – to circumvent the Irish nationality law, in Zambrano the application of the Belgian law was not disputed for it resulted from the international law rule that prevents statelessness[330].

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[329] MICHAELA HAILBRONNER and SARA IGLESIAS SÁNCHEZ, The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status (2011), 498-537.

[330] It seems that the fact of whether or not the Zambranos avoided registering their children with the Columbian consulate resulting that action in the attribution of Belgian citizenship to avoid statelessness remains unclear. Although Belgium adopted the rule in its nationality law, it is not a part to the Convention on the reduction of statelessness. For an interesting debate on this topic see KAY HAILBRONNER and DANIEL THYM, *Annotation of Case C-34/09* (2011), 1253 and MICHAEL A. OLIVAS and DIMITRY

It is also interesting to note the relationship that this case necessarily implies between citizenship, immigration and refugee law. A general principle of non refoulement is always present in this decision, although the Court did not decide to intervene in it, leaving the decision related to the asylum requests solely within the domain of the Belgian authorities.

Another distinct aspect that might be very important in the future is the question as to whether or not the family constitutes a burden on the social security system. In a passage, maybe unwanted by the Court, in the Chen case the Court affirmed that the Chen family would be allowed to benefit from the provision provided for in the directive since they had financial resources and would not constitute a burden on the British social security system.

That conclusion was, infamously, later used by several national immigration authorities to restrict the scope of the Chen decision. Whenever the claimants of the residence permit were not able to prove the financial means that showed they would not constitute a burden to the social security of the host state that would be considered a relevant fact for not fulfilling the conditions laid down in Chen.

It is unclear from the facts if the Zambranos would fulfill this condition as there are several references to social security. Indeed, since several requests for unemployment benefits were filed, I would say that probably that condition would not be considered to be fulfilled.

The truth is that the Court did not address the issue, so it is most probably a significant enlargement

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KOCHENOV, Case C- 34/09 Ruiz Zambrano: A Respectful Rejoinder (2012).

of the Chen doctrine with important consequences for many migrant families in similar situations.

In any event, the conclusion according to which the parents of children with EU citizenship are entitled, according to EU law, to reside with their dependent children as a derivative citizenship right was already solidly recognized in Chen.

What was not recognized in Chen was the possibility of absence of cross border movement, since the Chen case was all about crossing the UK border. Once again, the Zambrano case was not totally innovative, since the possibility of the intervention of EU law in citizenship cases that were apparently purely internal had already been achieved in Rottman.

All in all the case is of fundamental importance because it is a step forward in the affirmation of the federalization of EU citizenship.

Immediately following the Zambrano decision, the Court issued two decisions – Shirley McCarthy vs. Secretary of State for the Home Department[331] and Murat Dereci and Others v Bundesministerium für Inneres[332] – that represent a small step backwards in the euphoria that followed the Rottman and Zambrano cases.

Mrs. McCarthy, a national of the United Kingdom, was also an Irish national. She was born and had always lived in the United Kingdom, and had never argued that she was or had been a worker, self-employed person or self-sufficient person. She received State benefits. In 2002, she married a Jamaican national. Following her

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[331] Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department (2011).

[332] Case C-256/11, Murat Dereci and Others v. Bundesministerium für Inneres (2011).

marriage, she applied for an Irish passport for the first time and obtained it.

In 2004, Mrs. McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the ground that Mrs. McCarthy was not a qualified person (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr. McCarthy was not the spouse of a qualified person. She appealed to the Asylum and Immigration Tribunal against the decision that had been made in relation to her by the Secretary of State. The Tribunal dismissed the appeal in 2006.

The case was brought to the CJEU, which decided the following:

"*1. Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.*

*2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of*

*that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States*".

In November 2011 the Court issued another decision in a very similar sense.

A group of undocumented migrants from third countries all wanted to reside in Austria with their family members, who are European Union citizens resident in Austria and who are nationals of that Member State. It should also be noted that the Union citizens concerned had never exercised their right to free movement. By contrast, it must be observed that the facts giving rise to the dispute differ as regards, inter alia, whether the entry into Austria of the applicants in the main proceedings was lawful or unlawful, their current place of residence as well as the nature of their family relationship with the Union citizen concerned and whether they are maintained by that Union citizen.

For instance, Mr. Dereci, who is a Turkish national, entered Austria illegally and married an Austrian national with whom he had three children who are also Austrian nationals and who are still minors. Mr. Dereci currently resides with his family in Austria. Mr. Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national, with whom he currently resides in Austria. By contrast, Mrs. Heiml, a Sri Lankan national, married an Austrian national before legally entering Austria, where she currently lives with her husband, despite the subsequent expiry of her residence permit.

Mr. Kokollari, who entered Austria legally at the age of two with his parents, who possessed Yugoslav nationality at the time, is 29 years old and states that he is maintained by his mother who is now an Austrian national. He currently resides in Austria. Mrs. Stevic, a Serbian national, is 52 years old and has applied for family reunification with her father who has resided in Austria for many years and who obtained Austrian nationality in 2007. She has regularly received monthly support from her father and she claims that he would continue to support her if she resided in Austria. Mrs. Stevic currently resides in Serbia with her husband and their three adult children.

All of the persons listed above had their applications for residence permits in Austria rejected. In addition, Mrs. Heiml, Mr. Dereci, Mr. Kokollaria and Mr. Maduike have all been subject to expulsion orders and individual removal orders.

The applications were rejected by the Bundesministerium für Inneres, inter alia, on one or more of the following grounds: the existence of procedural defects in the application; failure to comply with the obligation to remain abroad whilst awaiting the decision on the application on account of either irregular entry into Austria or regular entry followed by an extended stay beyond that which was originally permitted; lack of sufficient resources; or a breach of public policy.

In all of the disputes, the Bundesministerium für Inneres refused to apply, in respect of the applicants in the main proceedings, a similar regime to that provided for in Directive 2004/38 for the family members of a Union citizen, on the ground that the Union citizen concerned had not exercised his right of free movement. Similarly, this authority refused to grant the applicants a right of residence pursuant to Article 8 of the ECHR

on the grounds, in particular, that their residence status in Austria had to be considered to be uncertain from the start of their private and family life.

The court decided the following:

"*1. European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.*

*2. Article 41(1) of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, must be interpreted as meaning that the enactment of new legislation more restrictive that the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision*".

These decisions temper the outcome of the Rottman and Zambrano cases[333]. It is worth noting that

[333] PETER VAN ELSUWEGE, European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department (2011), 313.

the facts do not exactly coincide with the previous cases. They do not involve children, statelessness or refugee claims. In that sense these cases are much less connected with citizenship interactions.

In practice all the situations corresponded to the will of third country nationals, in some cases undocumented migrants, to live with spouses or partners that were EU citizens.

In none of these cases was there a cross border movement.

If we compare the AG opinions in, for instance, the Zambrano case and the McCarthy case, they are contrastingly different. As Peter Van Esluwege acknowledges in his comment, "*first, where Sharpston recommended the Court to recognise that Article 21 TFEU contains a separate right of residence that is independent of the right of free movement, Kokott considered that EU citizenship law only applies in a cross-border context (…) Second, on the issue of reverse discrimination, Advocate-General Kokott merely recalled the Court's established position that 'EU law provides no means of dealing with this problem*"[334].

Although corresponding to a step backwards in the evolution that very rapidly occurred with Rottman and Zambrano, nothing in the MacCarthy and Murat cases preempts the idea of a federalist evolution of EU citizenship and its classification as a form of transnational citizenship.

What the Court said is simply that the application of EU law is still dependent, in some cases – because

[334] PETER VAN ELSUWEGE, European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department (2011), 310.

Rottman and Zambrano are still standing – on the cross border nature of the dispute.

It is true that in Rottman, for the first time, the Court accepted that a situation could fall by reason of its nature and its consequences within the ambit of EU citizenship law[335].

Again, as in previous CJEU decisions on citizenship, it is necessary to read between the lines to sometimes extract the most important conclusions. In both decisions the Court used the expression *provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union*. In practice what the Court is doing is introducing a limit to the potentially unlimited consequences of the Zambrano case, described by the doctrine as "frustratingly opaque"[336]. *A contrario sensu* what the Court is saying is that whenever there is a *denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union,* it is not a purely internal situation and EU law is applicable regardless of the cross border nature of the dispute[337].

A great development in EU citizenship law is yet to come. As I did not limit the scope of cases like Michelletti or Chen, I do not want to hyperbolize cases

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[335] PETER VAN ELSUWEGE, European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department (2011), 313.

[336] ANJA LANSBERGEN and NINA MILLER, European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM) (2011), 287.

[337] For a similar reading see DIMITRY KOCHENOV, A Real European Citizenship. A New Jurisdiction Test. A Novel Chapter in the Development of the Union in Europe (2011), 94-95.

like Rottman or Zambrano nor despair with cases like MacCarthy or Murat.

What is relevant to recognize for my overall thesis, in the light of these developments, is that EU citizenship provides an unparalleled laboratory for the study of citizenship as it represents the only example of a transnational institutional citizenship that is helping reshape the concept globally.

## §4. How is European citizenship reshaping the concept of citizenship?

In order to assess the impact of EU citizenship on the evolution of the citizenship concept in a larger context it is crucial to answer the question that Jo Shaw poses on the relationship between EU and national citizenship[338].

More specifically she is asking a question that the scholars, while praising the landmark nature of the Rottmann decision, do not necessarily answer: what are the immediate and long term implications of this decision on national laws of citizenship?

A first line of discussion relates to whether the Rottmann decision, being issued in a case of withdrawal of citizenship and statelessness, is also applicable to cases of granting citizenship[339].

I believe it is very clear that the Rottmann line of thought is also applicable to the granting of citizenship. Firstly this is because, as I have stated above, Rottmann is not particularly innovative if we consider an appropriate reading of Micheletti according to which EU law and International law posed limits on the granting and withdrawal of national citizenship[340].

Then, the Rottmann decision itself affirms explicitly that its provisions are applicable both to

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[338] JO SHAW, Concluding thoughts: Rottmann in context (2011), 40.

[339] NATHAN CAMBIEN, Case c-135/08, Janko Rottmann v. Freistaat Bayern (2010-2011), 375.

[340] NATHAN CAMBIEN, Case c-135/08, Janko Rottmann v. Freistaat Bayern (2010-2011), 375.

acquisition and deprivation of citizenship, as I have stated above.

Lastly, the biggest innovation of the Rottmann decision – the importance of which I do not deny – is that it highlights a principle of EU law that was not previously evident in this context: the principle of proportionality.

However, again, proportionality is just another principle of EU law that, among others, States must take into account when designing their national citizenship law, in order to comply with the Michelletti proviso "having due regard to community law". One of these other principles may well be, as AG Poiares Maduro asserts in his opinion in Rottmann, the principle of legitimate expectations.

It now being clear that states must "have due regard" to community law and that means complying with the proportionality principle when establishing citizenship rules, how does that impact on Member States' establishment of citizenship rules?

Analysing the impact of the decision on the Dutch nationality law, Gerard René de Groot and Anja Seling predict several consequences regarding the need to change the law[341]. In line with his previous work, De Groot identifies situations where Dutch law, as well as many other citizenship laws in Europe, must be reconsidered in light of these developments.

In a word it can be said that whenever a national citizenship law denies the granting of citizenship in a way that might be considered not to pass the proportionality test, and even if a cross border element

[341] GERARD RENÉ DE GROOT and ANJA SELING, The consequences of the Rottmann judgment on Member State autonomy – The Court's avant-gardism in nationality matters (2011).

is absent – after Zambrano –, that particular law is contrary to community law with all its consequences.

Does that place EU citizenship in the position of a federal citizenship?

According to Rainer Bauböck, there are three ways of looking into this relationship: "statist," "unionist," and "pluralist" approaches.

"*The statist approach regards the Union as a federal state-in-the-making and opts for a citizenship model that would reflect the principles applied within contemporary federal democracies. This approach has only few advocates and would entail a quite radical departure from the path the European Union follows to this day. Although it would be unwise to exclude the possibility of the EU's future transformation into a federal state, e.g., after a new major war involving several European states, this scenario is currently rather farfetched.*

*The unionist approach aims primarily at strengthening citizenship of the Union by making it more important for its individual bearers and more inclusionary for the Union's residents. It differs from a federal state model in that it seeks to emancipate Union citizenship from member-state citizenship rather than integrate the latter into the former. A unionist approach of this kind has many advocates amongst pro-European and pro-immigrant groups in civil society but remains rather marginal in European politics.*

*The pluralist approach represents a less demanding view in the sense that it includes no general commitment to strengthening citizenship of the Union vis-a-vis the member states. Instead, it seeks to apply general norms of democratic legitimacy at both levels and to balance these concerns where they appear to conflict with each other. The label pluralist emphasizes, on the one hand, the autonomous value of both levels of*

*vertically-nested citizenship and, on the other hand, respect for the horizontal plurality and autonomy of member-state citizenship. It is meant to apply to the EU in its current state of federal integration. At the same time, the pluralist approach that I will describe and defend is still reformist in seeking to overcome normative deficits of the present arrangement and integrative in promoting a more consistent conception of multilevel citizenship compared with the status-quo*"[342].

Although Bauböck was writing before the latest developments in EU citizenship law from the court decisions, I would still adhere to his thesis.

We are still not at the point of considering a federal citizenship, not only because the EU is not a federal state at the moment, but also because national citizenship is still a product of the national legislator. While it is true that the local legislator can have a relevant role even in federal citizenships, as the Swiss example shows[343], I will not claim that the role of the national legislation in the EU is at that stage now.

Following on from Bauböck´s proposal, I would view the EU citizenship influence on national citizenship rules with the pluralist approach, as a multilevel status that is clearly intertwined and definitely influences national law, both in relation to the granting and withdrawing of citizenship.

In an effort to maintain consistency in his thesis that reaffirmed the idea of the domestic reserved domain even within the EU citizenship law, Jessurum

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[342] RAINER BAUBÖCK, Why European Citizenship? Normative Approaches to Supranational Union (2007), 466-67.

[343] RAINER BAUBÖCK, Why European Citizenship? Normative Approaches to Supranational Union (2007), 482.

d´Oliveira advocates a decoupling of EU and national citizenship law[344].

It is very remarkable that even a scholar whose views on the existing CJEU decisions on citizenship have tended to deny the strong interactions between EU and national citizenship[345] acknowledges the revolutionary importance of the more recent case decisions. In fact, he says, that "*what the Court is doing is reversing the relationship between the possession of a nationality of a member state and Union citizenship. Because Union citizenship is at stake when the nationality of a member state is lost or acquired nationality law has to take this consequence into account. That nationality law is thereby made dependent on Union law to a certain extent, while Union citizenship is precisely presented by the Treaty as being a dependent variable of the possession of the nationality of a member state. If one follows the Court's line of thought to its logical conclusion, then every member state has to take EU law into account at the time of acquisition or loss of its nationality, because Union citizenship systematically depends on it*"[346].

This is a crucial conclusion, especially relevant in the words of an author that represents the more cautious line of thought on this relationship: from now on every

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[344] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 149.

[345] H. U. JESSURUM D´OLIVEIRA, Case C-369/90, M.V. Micheletti and others v. Delegacion del Gobierno en Cantabria (1993), 634.

[346] H. U. JESSURUN D'OLIVEIRA, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note I - Decoupling Nationality and Union Citizenship? (2011), 147.

member state must take into account EU law when establishing internal rules on access to citizenship.

In an attempt to maintain the autonomy of internal citizenship law, D´Oliveira proposes a decoupling of the concepts.

As he describes it "*there is room for decoupling the concepts of nationality and Union citizenship: by maintaining Union citizenship in the case of loss of member state nationality under certain circumstances (to be determined). That has the great advantage that in order to emphasize the importance of Union citizenship, the EU would no longer need the (indirect) authority over the nationality law of the member states that the Court has accorded to it, and that can only serve to benefit the clarity of the relationship between the member states and the EU. If the EU sees Union citizenship as a fundamental status for the peoples of Europe, then that no longer needs to depend on the idiosyncrasies of the application of national nationality law, but rather the EU can determine that certain groups of people who lose their member state nationality will nonetheless remain Union citizens. The Rottmann case makes it relevant to think about decoupling them in this way*".

This proposal is in fact an interesting recognition of the EU citizenship status as a multilevel status with undeniable interactions with national citizenships. I do not advocate a monolithic concept of EU citizenship and find the multilevel approach very appealing. In fact, that approach has always been favoured by those that uphold a vision of interaction between EU and national citizenship.

However, for the purposes of my argument it is important to recall – and this is undeniable even for the more sceptical doctrine – that the Member States must comply with EU law when establishing the rules of

access to citizenship and if they breach it the Court is competent to review the case.

The idea itself is revolutionary but, as I have stated above, it has long been the result of the correct interpretation of EU law and CJEU case decisions.

The impact of EU citizenship on national citizenship law cannot be limited to the EU Member States. It is evident that the CJEU jurisdiction does not extend to the rest of the world. However, it is also true that the principles identified by the CJEU are not inherently European.

In fact, unlike a typical federal decision, the CJEU is not identifying federal rules and principles and making them mandatory for the States. The principle of proportionality is not only a principle of EU law but also a principle of international law. What the CJEU is saying is that this principle matters in citizenship issues.

Bearing in mind that the Michelletti proviso demanded respect for Community law but also international law, the CJEU contribution is not irrelevant when drawing a general conclusion or noting a trend towards considering proportionality when assessing whether national global citizenship rules comply with general international law.

It is clear that, although international law boundaries on citizenship are growing, they are still limited when compared to those we can identify within European citizenship.

So is European citizenship closer to a national citizenship or is it leading the way to a new form of transnational citizenship and a revolution in the way international law treats citizenship?

Those who try to encapsulate European citizenship point to the model of federal citizenship. Having federal elements in its constitution, the European Union

could be the cradle for a federal citizenship. The Swiss example and the early US example show that derivative citizenship is not an obstacle to a true federal citizenship[347].

On the other hand, it can be argued that being derivative and not yet having left that stage, European citizenship is closer to transnational law and thus to transnational citizenship.

It is clear, as stated before, that European citizenship is very different from national citizenships, even those in early federations. Of course one can argue that Europe is a very young federation and huge development for the status can be foreseen.

As Christoph Schönberger asserts, "*as a general rule, one can conclude that the primacy of state citizenship is the normal situation of young Federations based on a voluntary agreement of formerly independent states. The system only tends to be abandoned much later once the Federation is consolidated*"[348].

That might be the case had citizenship not been an evolutionary concept. Citizenship has undergone great developments and can neither be captured nor crystallized.

In any event, European citizenship has contributed largely to reshaping the concept of citizenship[349].

What, then, was the main purpose of the drafters in creating European citizenship?

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[347] CHRISTOPH SCHÖNBERGER, European Citizenship as Federal Citizenship, some citizenship lessons of comparative federalism (2007), 62.

[348] CHRISTOPH SCHÖNBERGER, European Citizenship as Federal Citizenship, some citizenship lessons of comparative federalism (2007), 70.

[349] ELEANOR SPAVENTA, Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects (2008), 17.

Definitely underlying this was the will to create the European people. Furthermore European citizenship was created in my view as a way of granting legitimacy to the European institutions.

The evolution of the EU remains largely inter-governmental, which means that the legitimacy of the European institutions relies primarily on Governments and Parliaments and only indirectly on the people.

This contributes largely, as I have previously stressed, to the crisis of the institutions in Europe – beginning with the European constitution – because there is little control from the people over institutions and political decisions.

The actual meaning of citizenship in a democratic society depends on its relationship with the people. Only the people can legitimate a political structure and its rules and institutions.

Joseph Weiller stresses that being a beneficiary of rights created by others does not transform the alien into a citizen and, thus, citizenship is an important source of legitimacy for legal rules. The legitimacy of those rules relies on the *demos* to which the alien aspires to belong[350]. If that legitimacy does not exist, the rules and the institutions are themselves in crisis for they can no longer be called democratic[351].

According to Seyla Benhabib, the democratic rule means that every member of a sovereign body is to be respected as a possessor of human rights in a self-governance regime in which everyone shall be

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[350] JOSEPH H. H. WEILER, European Citizenship. Identity and Differentity (1998), 8; MASSIMO LA TORRE, Citizenship, Constitution and the European Union (1998), 451.

[351] JÜRGEN HABERMAS, The European Nation State – Its Achievements and Its Limitations – On the Past and Future of Sovereignty and Citizenship (1997), 112.

simultaneously recognized as author and subject of the laws[352]. When that rule is not complied with we would have a "paradox of democratic legitimacy". I will come back to this paradox later.

I believe that the creation of European citizenship tried to cope with this paradox by designing the European people. This would overcome the crisis of legitimacy in the European institutions. Obviously the drafters' efforts did not succeed.

This is not to say that the drafters went in the wrong direction. The effort was positive and contributed, as stressed before, to improvements in the international perception of citizenship. The problem is probably not in European citizenship itself but in the concept of national citizenship of the Member States – and ultimately sovereignty – upon which European citizenship largely relies.

[352] SEYLA BENHABIB, Transformation of citizenship: The case of contemporary Europe (2002), 449.

# V – Migrants' rights protection and migrants as citizens in waiting

## §1. Global Protection of migrants' rights

Immigration represents an important challenge to the internal laws of the States. The need for law enforcement, integration of foreigners and the definition of their rights and obligations and the relationship between immigration and citizenship rules are some of the aspects that concern lawmakers and judicial actors all over the world.

In this context it is particularly important to define the rights of so-called 'Migrant workers'. In fact, the increased mobility resulting from the simplification of travel, globalization, and a greater awareness of national disparities and of migration opportunities has led to major movements of people seeking work in countries other than that of their origin.

It is therefore very important to assess the international legal rights and protection of migrants and migrant workers and their families which have been developed in order to prevent these persons from being exposed to exploitation and all sorts of illegal activities. Recent examples show that migrants are particularly vulnerable to the actions of clandestine immigration networks, of which they are, unfortunately, the main victims.

As I have stressed above, an important dimension in the protection of rights can nowadays be found in the

universalization of human rights and human dignity[353]. For that purpose, personhood has replaced citizenship.

Even at the internal level, Constitutions have been placing human dignity at the maximum level of the consecration of fundamental rights, which means that they cannot deny these rights to foreigners simply because they lack the quality of citizens[354].

Citizenship rights as such are thus reduced to those rights that have an inseparable link to the status of citizen. Since human dignity is the cornerstone of fundamental rights, one should conclude that most fundamental rights are inextricably linked to the human person regardless of the citizenship status.

The mass movements of people that we have recently witnessed are based on very different motivations. As I have stated above, seeking a better job and overall living conditions can still be identified as the major reason why people migrate[355]. According to UN figures, the overwhelming majority of migrants in the world who are not refugees left their countries of origin in search of better economic conditions[356].

However, that search does not always take place from developing countries to developed countries - the so-called the South-North move. It also takes place within developing countries. Indeed, in 1980, 48% of

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[353] In general, on the universality of human rights see CHRISTIAN TOMUSCHAT*, Human rights: between idealism and realism* (2008), 69-96.

[354] GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 13.

[355] For an assessment of migrant labor protection see PATRICK A. TARAN, The need for a rights-based approach to migration in the age of globalization (2009), 50-168.

[356] HANIA ZLOTNICK, International Migration Trends since 1980 (2005), 16.

all international migrants lived in developed countries (except the USSR) and 52% in developing countries. However, this situation changed and in 2000 63% of all international migrants were living in developed countries while only 37% lived in developing countries[357].

The migratory movements which led to these changes resulted from several factors. Salary differences and job opportunities made the developed countries increasingly attractive as a destination for migrants from developing countries, especially when other links already existed, such as family ties or national origin networks. It is often the case that a particular national minority is known for a certain profession in a country. That could be the case of cab drivers in Luxembourg – who tend to be Portuguese – or deli owners in New York City – most of whom are of Asian origin. The reason for these factors is not so much the special dedication of those workers to that particular function but much more the pre-existing ties and jobs found by countrymen.

The above data is of great importance in understanding the legal framework of the migratory movements. Indeed, although the trend indicates intensified movements from South to North, numbers show that migration between developing countries is still significant. On the other hand, the data also indicates that the pre-existence of ties between countries or people is a key factor in the geographical distribution of migratory movements. This means that while regulating migration and migrants' rights – both from an international and a national standpoint – particular attention should be devoted also to the

[357] HANIA ZLOTNICK, International Migration Trends since 1980 (2005), 16.

members of the migrant's family's, since family ties are still a very relevant element in the decision to migrate.

The most comprehensive international instrument on the protection of migrants' rights is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which I will analyze later.

Although the Convention is not the only international instrument relevant to this subject, it is, however, the most recent in a body composed of seven instruments that correspond to the "core" of international treaties on human rights.

The other six are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child[358].

The reason why the core UN treaties on Human Rights are invoked within the context of the protection of migrants is again due to the fact that most of the migrants' rights which need protection relate to personhood and not to citizenship or to their particular condition as migrants. So whenever talking about migrants' rights we are generally referring to Human Rights.

This raises the question about the need for a specific convention on the protection of migrants' rights or the rights of migrant workers. It also raises the

[358] For a comprehensive analysis of the Migrants' rights in UN human rights conventions see ISABELLE SLINCKX, Migration and human rights: the United Nations Convention on Migrant Workers' Rights (2009), 122-149.

question of the compatibility of such a convention with the other instruments.

Although it seems clear that earlier instruments on human rights already enshrined basic human rights at the international level, a specific convention dealing with the protection of migrants in general or with migrant workers in particular is nevertheless very useful. It not only codifies in one instrument all the rights of migrants that are protected but can also address rights that are specific to migrants, such as the right to family reunification.

As to the compatibility, as long as such a convention develops the core instruments applicable to human rights within the migrants' rights context, there is no reason to fear any kind of overlapping that could cause any harm either to the protection of migrants' rights or to the coherence of the international system.

In addition to the regulatory framework resulting from the general treaties on human rights, it is also important to take into consideration the work developed by the International Labor Organization (ILO), especially on the protection of migrant workers' rights.

Among the instruments that were approved within the ILO, two are particularly important: the Migration for Employment Convention, 1949 (No. 97) based on equal treatment of nationals and legal immigrants in employment, and the Convention on Migrant Workers 1975 (No. 143), which aims to eliminate illegal migration and employment and establishes conditions and respect for the rights of undocumented migrants, establishing measures in order to both eliminate illegal networks and punish employers[359].

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[359] OFFICE OF THE HIGH COMISSIONER FOR HUMAN RIGHTS, *The International Convention on Migrant Workers* (2005), 15; MICHAEL

The Migration for Employment Convention, 1949 (No. 97) requires member states to recognize equal rights and provide equal treatment to migrant workers without any discrimination based on nationality, race, religion or sex. States should treat documented migrants as if they were citizens with respect to labor rights, according to its internal legislation.

According to Convention No. 143 member states must respect the human rights of all migrant workers. States should also eliminate illegal migration networks and impose sanctions on employers. In addition, states should adopt and pursue a policy to ensure equal treatment in employment and the enjoyment by migrant workers of social security, union rights and cultural rights.

The legal framework for the protection of migrants' human rights at the international level is composed of the basic core UN treaties on human rights and is complemented by the specific provisions on migrant workers in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and also within the ILO context[360].

Maybe a general convention on protection is necessary, especially to set out international migrants' human rights protection in a unified document. However, as I will show when describing the negotiation and ratification process of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, this would never be an easy and consensual endeavor.

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HASENAU, ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis (1991), 692-696.

[360] DAVID WEISSBRODT, *The human rights of non-citizens* (2008), 182-206.

## §2. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is the only comprehensive public international law instrument that specifically deals with migrants' rights.

It was adopted by Resolution 45/158 of the General Assembly of the United Nations, on 18 December 1990. This Convention entered into force on 1 July 2003, after ratification by the first twenty States Parties.

The Convention aims, as stated in the Opinion of the European Economic and Social Committee "*to protect the human rights and dignity of people across the globe who emigrate for economic or employment-related reasons by means of appropriate legislation and good national practice. The common basis for such international legislation on migratory policies should be the promotion of democracy and human rights. The Convention also safeguards the balance between the different situations in both countries of origin and host countries.*

*This convention is one of seven international United Nations treaties governing human rights. It recognizes that certain basic human rights, as defined in the Universal Declaration of Human Rights, must be guaranteed internationally for all migrant workers and their families. It codifies in a comprehensive and universal manner the rights of migrant workers and their families on the basis of the principle of equality of treatment. It sets out those rights that must be granted to immigrants who are in a regular and an irregular*

*situation, setting down minimum standards of protection in terms of civil, economic, political, social and employment rights and recognizing that migrant workers must have fundamental rights that are safeguarded in international rules.*

*This convention further develops previous conventions of the ILO by extending the legal framework to all immigration worldwide, promoting just treatment for immigrants and striving to prevent exploitation of irregular immigrants. It looks at the migration process as a whole from education, selection, departure, transit and residence in the country of employment to return to and re-establishment in the country of origin*"[361].

The content of the Convention would seem to be quite consensual, given that it entails rights that are already protected by both the international human rights legal system and by the internal constitutions. In fact, beyond a reference to fundamental rights enshrined in the majority of modern constitutions, the Convention focuses much of its attention on the rights of workers - also included in this list of fundamental rights - adapting them to the specific needs of the migrants.

However, the length and complexity of the ratification process contradicts this assertion. Indeed, the Convention entered into force almost thirteen years after its signature. As of today, none of the developed countries that are known for being "host states" have ratified it[362].

The formal process of drafting the Convention began on December 17, 1979, when the UN General

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[361] (2004/C 302/12), Opinion of the European Economic and Social Committee on the 'International Convention on Migrants'.

[362] According to the UNCHR website as of January 2013, 46 countries ratified the convention.

Assembly, through Resolution No. 34/172, created a working group, open to all member states, with the purpose of drafting an international Convention for the protection of all migrant workers and members of their families. Eleven years later, on December 18, 1990, the text was adopted and opened for signature by the member states[363].

The working group was open to all UN member states. The working method used by the UN diverged from other international texts. The decision was taken to create an open working group rather than limit it to a restricted number of countries or request a draft from the International Law Commission. The result was a very flexible and open method that ended up providing meaningful representation and a desirable universality[364].

The main method of decision was not based on the majority rule but on consensus. The consensus was "the natural development of a protracted negotiation that began in an atmosphere of distrust and hostility. This working method also avoided friction between developed or industrialized countries and most developing countries. The text of the Convention however suffered the effects of this method. The commitment has resulted in the abandonment of the strongest positions, and where the content was more controversial, the rights of migrants quickly became mere recommendations to states.

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[363] GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 27.

[364] RYSZARD CHOLEWINSKI, *Migrant workers in international human rights law: their protection in countries of employment* (1997), 143.

Adopting the consensus rule also had the objective of facilitating the ratification process. The subsequent developments have shown that the effort was not successful[365].

One of the most striking aspects of the Convention negotiations was the existence of coordinated groups of countries. It was possible to clearly identify four groups: i) the group of the eastern countries, composed of the USSR and its allies, ii) the group of 77, including the authors of the original proposal (including Algeria, Mexico, Pakistan, Turkey, Egypt, Barbados and Yugoslavia, and Morocco and India, which also belonged to this group although often followed isolated positions), iii) the MESCA (Mediterranean and Scandinavian), which was the most influential group, composed of seven Mediterranean and Scandinavian States (Spain, Portugal, Greece, Italy, Finland, Norway and Sweden) and iv) the group of Western and industrialized countries not belonging to the MESCA (including the United States, Australia, Germany, Netherlands, Denmark, Canada and Japan). France maintained an independent position as an observer of the MESCA[366].

MESCA's position was directly against undocumented immigration. According to MESCA,

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[365] JUHANI LONNROTH, The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation (1991), 724.

[366] JUHANI LONNROTH, The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation (1991), 731; RYSZARD CHOLEWINSKI, *Migrant workers in international human rights law: their protection in countries of employment* (1997), 144.

encouraging this form of migration would make it even more difficult to control[367].

On the other hand, the group of 77 was concerned, during the negotiations, primarily with the protection of its nationals as migrant workers and their treatment in the host countries[368].

According to Cholewinsky, the industrialized countries had three fundamental concerns during the negotiations. Firstly, they wanted to maintain sovereign control over immigration policy regarding the admission of immigrants and the legalization of undocumented immigrants. They also specifically opposed the provisions entailing positive obligations rather than mere suggestions and, consequently, social costs. Thirdly, they were committed to ensuring that the Convention was flexible enough to accommodate various political, legal and administrative views and internal regulations[369].

The MESCA group, despite having emerged as a reaction to the proposal of the Group of 77, came to assume a key role in the negotiation of the Convention. Its position appeared to mediate the arguments of developed and developing countries[370].

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[367] RYSZARD CHOLEWINSKI, *Migrant workers in international human rights law: their protection in countries of employment* (1997), 144.

[368] GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 29.

[369] RYSZARD CHOLEWINSKI, *Migrant workers in international human rights law: their protection in countries of employment* (1997), 145.

[370] JUHANI LONNROTH, The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation (1991), 733.

Despite the efforts during the negotiation process of the Convention to make it easier and to speed up the ratification process, this proved to be long and winding. The Convention was adopted by Resolution 45/158 of the General Assembly of the United Nations on December 18, 1990, and only came into force, thirteen years later, on July 1, 2003, after the ratification of the first twenty states.

In any event, the Convention entered into force without the ratification of most of the host States. The developed countries could argue, nevertheless, that the non-ratification of the Convention does not undermine their compliance with the other fundamental international instruments that protect human rights, and that their own constitutions already protect the same kind of rights both for documented and undocumented migrants. They may also argue that the Convention adds little to their practice of protection of migrants' rights. However, if that is the case, there is no reason for their lack of enthusiasm in ratifying the convention.

The reason for that lack of enthusiasm may be another. In fact, the Convention is applicable to *all* migrants. *All* migrants, in this context, means documented and undocumented migrants. Although the elimination of undocumented migration was a common concern during the negotiations, it was not so clear that the protection of the undocumented migrants would be. Having, for the first time, a comprehensive international document that specifically provides for rights of undocumented migrants might be an additional reason for the reluctance of developed countries in ratifying the Convention.

One of the most relevant aspects of this Convention is the definition of migrant worker. According to Article 2, "the term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in

a remunerated activity in a State of which he or she is not a national".

According to Article 3, the Convention shall not apply to a) persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions; (b) persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers; (c) persons taking up residence in a State different from their State of origin as investors; (d) refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned; (e) Students and trainees; (f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

This provision seeks to exclude from the scope of the Convention some categories of workers that shall not be treated as migrant workers. That is the case of stateless persons, the representatives of States or international organizations, and refugees. In the latter case they are already protected by other international instruments, such as the Convention relating to the Status of Refugees.

More debatable is the question of whether these categories – particularly the stateless – have sufficient protection in the international instruments applicable to their situation.

Also debatable is the exclusion of investors, students and trainees. One of the Convention's criteria for defining migrant workers is the compensation of the activity. So here the reference to trainees should be interpreted as referring to persons included in unpaid training programs.

The explanation for the exclusion seems to be the attempt to prevent the loss of critical mass – also known as brain drain – that would result from the settling of students, usually with great potential, in the host countries. Another explanation may be the relative immunity of these categories to the illegal immigration networks, the main focus of concern of the Convention.

Even more incomprehensible is the exclusion of investors. Indeed, they carry on a profitable activity so the criteria used in the convention related to remuneration would be fulfilled. Another reason, however, may explain the exclusion of investors from the scope of the Convention. According to Lönnroth, an ideological reason might explain this exclusion, as the protection of migrants' rights was perceived as the protection of the poorer workers. The name "Onassis" was widely used as a reference in this debate. Paradoxically, too, the traditional view of emigration as potentially being beneficial to the country of origin may have led to hesitation in accepting a consolidation of the situation of certain categories of migrant workers. For example, owners of shops in Paris might shorten their stays and send larger remittances to their countries of origin if they did not enjoy too many rights in the host country. Ideological as well as strategic reasons may therefore justify this exclusion[371].

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[371] JUHANI LONNROTH, The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of

States are, however, prohibited from making exclusions other than those mentioned in the Convention. The Convention applies – as indeed the title expressly states – to *all* migrant workers. As mentioned above, in accordance with Article 88, "a State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to Article 3, exclude any particular category of migrant workers from its application".

During the negotiations there was an intention to include a provision that would allow states to specify parts of the Convention applicable to certain categories of people in conditions of reciprocity. It would allow the non-application of certain rights. The application of the Convention on a reciprocal basis was rejected based on the belief that this concept would be contrary to the idea of universality of fundamental rights and could lead to discrimination in treatment by the host countries of migrant workers according to their country of origin[372].

In addition to migrant workers the Convention is concerned also with the protection of the members of their families. Under Article 4 of the Convention, the term "family members" means "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned." The

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International Migration Policies: An Analysis of Ten Years of Negotiation (1991), 719.

[372] RYSZARD CHOLEWINSKI, *Migrant workers in international human rights law: their protection in countries of employment* (1997), 148.

definition of "family member" rests largely on external rules to the Convention since it refers to the internal legislation of the States or bilateral or multilateral agreements. It is understood that the Convention did not wish to take a position in matters as controversial as the definition of the family. However, States are under a general obligation of non-discrimination.

Most of the rights protected in the Convention are common to documented and undocumented migrant workers in regular and irregular employment. This shows that according to the Convention the protection of human rights is directly connected with personhood and not with the legality of the immigration or the citizenship status[373].

There are, however, some rights that the Convention includes as being exclusively documented rights – Articles 36 to 56. These rights are generally in direct correlation with the immigration status of the migrants. Among these rights are the maintenance of political rights in the country of origin (Article 41); social rights (Article 43), the right to exemption of import/export taxes related to household goods (Article 46), the right to free transfer of funds or remittances from the State of employment to the State of origin or any other State (Article 47), the right of residence and work (Article 49), the right to choose an activity (Article 52), the right to labor protection (Article 54) and the right not to be expelled (Article 56).

There are also a number of social, political or economic provisions relating to more sensitive matters that were set out as recommendations to States. This is

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[373] GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 44.

the case of the recommendation that the host States permit movement within their territory of migrant workers and members of their families (Article 38), the mild recommendation for the recognition of political rights in the host country (Article 42), the recommendation on family reunification (Article 44).

Some rights which are exclusively for documented migrants are more disputable, since it is argued that they could well be extended to undocumented migrants, as they relate more to personhood than to the specific status of the migrant in the host country. This is the case of the right to information (Article 37) and the right of association (Article 40)[374].

In any event, it is important to recall that the Convention shall not undermine the sovereign decision of states on immigration admittance. As the Convention clearly states in Article 79, "nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention".

As for citizenship, although not providing for a specific right to citizenship, the Convention includes in Articles 1 and 7 a general rule of non-discrimination based on nationality and a right to a nationality of children, in Article 29. Also, as I have described above, the Convention encourages States to extend some rights that are traditionally associated with the citizenship

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374 GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 44.

status to documented migrants. This is a reproduction of the rule set out in the general treaty on the rights of children, which, by granting a fundamental right to nationality, aims to avoid statelessness among children.

## §3. The protection of undocumented migrants

### a) The protection of undocumented migrants within the Convention framework

One of the main concerns of the Convention drafters was the tension between States in favor of the rights of undocumented migrants and others who understood that these provisions could encourage undocumented migration[375].

From the political point of view the position adopted in the Convention is a compromise between the states that saw the recognition of rights for undocumented migrants as a threat to their sovereignty and others that declared that the protection of these rights was the only position consistent with the international protection of human rights and human dignity.

According to Article 5 of the Convention, "for the purposes of the present Convention, migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article".

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375 GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 46.

This provision does not undermine the general principle according to which it is a sovereign decision of the states to regulate migration and define the status of its migrants. As I have mentioned above, the convention is very clear in this respect, stating in Article 79 that "nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families".

So the Convention distinguishes the rights that are exclusive to documented migrants from those which provide protection to both documented and undocumented migrants.

It would be important to discuss whether this distinction is acceptable from the general international law perspective and from a universal protection of human rights standpoint[376].

While it is true that international law does recognize the right of each State to establish the admission criteria in terms of immigration rules, such a power may not be used to discriminate with regard to the protection of basic human rights that are connected to personhood and not to the legality of the presence in a given territory.

Thus, to assess whether such discrimination complies with international law, the criterion used to exclude rights from undocumented migrants must be a meaningful one that does not discriminate on the basis of their national origin. The only meaningful criteria are the ones that relate those exclusive rights directly with the legality of the migrants' presence in a given

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376 GONÇALO SARAIVA MATIAS and PATRÍCIA FRAGOSO MARTINS, *A convenção internacional sobre a protecção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspectivas e paradoxos nacionais e internacionais em matéria de imigração* (2007), 51-52.

territory. As I have stated above, it is not clear that this is the case with all the rights that the Convention excludes from undocumented migrants.

As I have also underlined above and will further develop later, there are practical obstacles to the exercise of rights granted to undocumented migrants, even those protected by the Convention. Assuming that an undocumented migrant finds himself in need of emergency medical assistance or may wish to benefit from a given social right – rights, moreover, recognized by the Convention – the lack of protective measures against communication to the immigration authorities can lead to deportation. That possibility will necessarily discourage undocumented migrants from the exercise of those rights. The Convention contains no mechanism to prevent that effect.

Two solutions could be equated to this problem, within the Convention framework. The first would provide for a recommendation to the states to proceed with the legalization of undocumented migrants found in its territory. It seems clear, however, that this solution would hardly be accepted by the states. Another solution would be to provide a mechanism whereby 'undocumented immigrants could not be prosecuted for breaches of immigration law based on information obtained in the exercise of rights under the Convention[377]. I will come back to these possible solutions in a more general approach later in this chapter.

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[377] LINDA BOSNIAK, Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers (1991), 742-745.

### b) Main issues concerning undocumented migration

The world faces today, as ever, the problems of undocumented migration. Economic inequality has worsened between economic blocs. The flow of information today is very fluid so that the citizens of poor countries, despite this condition, are aware of global asymmetries and aspire to a better life. Illegal migration networks have flourished, supported by transportation facilities and the inefficiency of States in controlling their borders.

Undocumented migration involves many disadvantages both for migrants and for host countries. From a humanitarian standpoint, migrants are subjected to the exploitation of clandestine migration networks that take from them substantial financial means and provide transport in deplorable conditions that endangers their life and physical integrity.

The activity of these networks is of course paid. The already precarious economic situation of migrant families is worsened by the payments to these networks. Often they cannot reasonably expect any return from these payments. With the reinforced border control resulting in part from undocumented migration but also due to the necessity to control terrorist activities, undocumented immigration has grown by use of clandestine networks.

From the standpoint of the host State, the disadvantages are also considerable. Undocumented migration undermines the integration of immigrants since their status will always constitute an obstacle to a full and peaceful integration. On the other hand, the presence of undocumented migrants challenges the internal working conditions in general since it allows employers to maintain low wages. In addition, the

possibility of deportation causes a latent tension between the country of origin and the migrants' host country.

From a purely economic point of view, undocumented migration is sometimes perceived as being beneficial for the host country. The low wages paid to undocumented migrants and the black market economy allow certain sectors to compete in the global market.

However, no country can seriously rely on such a strategy on a long-term basis. Low wages and lack of contribution to the social security systems in the medium term jeopardize the livelihood of the host country itself as this represents a decrease in tax revenue and a social security breach. On the other hand, the flexibility of the undocumented workforce - who often assume all sorts of functions and conditions by virtue of their vulnerability - and the ease with which states can proceed with deportation may also explain some tolerance of host countries towards this phenomenon[378].

The truth, however, is that the presence of undocumented migrants in a state presupposes a failure to control its borders. States have always claimed control of migration as part of their sovereignty, by its integration within their exclusive domain. Practice has, however, shown that states cannot control or halt illegal migratory movements. Therefore, although they have

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[378] RYSZARD CHOLEWINSKI, *Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment* (1997), 13. Using the expression "mutual forbearance" to describe a similar phenomena see GREGOR NOLL, Why Human Rights fail to protect undocumented migrants (2010), 267.

that authority, states have generally failed to prevent the entry of undocumented migrants[379].

States are engaging in debate about the extent of any rights to be conferred on undocumented migrants. The special vulnerability of these migrants requires a careful study of their rights and their protection[380].

Not only are basic rights often denied to undocumented migrants, but also in the cases where these rights are protected, it is a challenge to protect their exercise. Indeed, an undocumented migrant who wishes to take advantage of social rights recognized by a particular State may well face the consequences of exercising those rights by exposing his illegal status to the authorities.

The public debate about undocumented migration is surrounded by controversy. Against the protection of undocumented migrants' rights many claim that the extension of rights to these migrants would encourage and even reward future violations of territorial integrity of state borders. Given these arguments, states have adopted a consistent policy, increasing the control of undocumented immigration and using severe criminal measures to punish promoters of illegal immigration and employers who hire undocumented migrants.

### c) Rights of undocumented migrants

Undocumented migrants, as human beings, ought to be entitled to all the rights that are connected to

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[379] LINDA BOSNIAK, Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention (1991), 742-745.

[380] For a thorough analysis of the debate on undocumented migration through the very effective and interesting dialogue method see STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009).

personhood and these rights must be protected by every State as they are protected for nationals[381].

A State may not differentiate or adopt different standards of rights protection on the basis of national origin or nationality. This is a natural outcome of the equality principle under international law[382].

Despite these basic assertions and principles, liberal democracies seem ready to accept some form of discrimination between citizens, migrants and undocumented migrants[383].

The principle of equality and the equal protection doctrine have been adopted by most of the liberal democracies´ Constitutions or legal systems. That means that any discrimination based on alienage is inherently suspect and subject to close judicial scrutiny. The court decided that alienage is considered as a suspect classification in Graham v. Richardson[384], unlike a previous somewhat different finding in Plyler v. Doe[385]. It is worth noting, though, that Graham involved discrimination against a lawful permanent resident, unlike Plyler, which concerned undocumented aliens.

Gerald Neuman points out a normative argument that has been used to justify discrimination based on alienage. According to this argument, citizens are members of the polity and aliens are not; therefore

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[381] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 34-35.

[382] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 34-35.

[383] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 39-49.

[384] Graham v. Richardson, 403 U.S. 365 (1971).

[385] Plyler v. Doe, 457 U.S. 202 (1982), HIROSHI MOTOMURA, The rights of others: legal claims and immigration outside the law (2010), 1732-1733.

society has a right to reserve goods for citizens. Neuman responds to this argument saying that even if aliens are not full members of the polity, some aliens are also members. It means that even if some goods can be reserved for citizens, not all of them can[386].

That brings us to a crucial question. It is clear that States can discriminate against citizens, residents, aliens, and undocumented migrants. It is also evident that this discrimination is suspect and should be under close judicial scrutiny. But what should the criteria be for allowing discrimination. What is the basis to discriminate?

As I have stated above, personhood has replaced citizenship in the recognition and enjoyment of most human rights. These rights are inherent to the human being regardless of his status or national attachments.

This is set out in the UN core human rights protection instruments. It is also particularly clear in the Convention discussed above. This means that fundamental rights like the right to life but also freedom of thought or due process must be recognized for every human being[387].

Denying anyone – regardless of his status – such rights would not only be a violation of international law, it would be a violation of basic principles of *ius cogens* that every State, company or individual is bound to respect.

In a liberal democracy it would also be a direct violation of its Constitution.

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[386] GERALD L. NEUMAN, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine (1994-1995), 1427.

[387] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 98.

It is not easy to find in a State's fundamental rights protection a group of rights that is identifiable as *discriminable* rights. This exact difficulty was faced by the drafters of the Convention when pointing out rights that ought to be exclusive to citizens or even to documented migrants. In some cases the result is disputable, as I have stated before.

If a certain consensus might be found around the idea of extending human rights to all human beings – thus including undocumented migrants – the same consensus will certainly not arise when discussing social rights.

One might say that social rights are connected to the social contract and only those who are lawfully part of that contract should be entitled to the benefits.

However, it is not so simple. Some of these rights are enshrined as human rights in many Constitutions. In fact not all of the so-called social rights can be completely detached from the concept of human rights.

Healthcare can be considered a social right but can certainly be perceived as a human right when emergency healthcare is at stake. Education can certainly be presented as a social right but can hardly be denied to innocent children, even if their parents are immigration law violators.

Stephen Legomsky discusses several arguments that are usually used to deny social rights to immigrants[388]. First and foremost, there is the financial argument. If there is one distinction between human rights and social rights that is not foreign to this discussion it is the financial aspect. In fact, protecting the life or freedom of foreigners does not cost more

[388] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State, (1994-1995), 1464.

than protecting the same rights of citizens. An organized State will provide police, firemen and other public safety and order services that will guarantee those rights within its territory. To deny them to foreigners would imply a direct, unsustainable and even unfeasible discrimination. A police officer or a fireman does not ask the nationality or the immigration status of a person before acting to save his life.

This is probably not necessarily the case of due process. One can certainly think of the massive costs of legal defense and fees when some procedures against foreigners are supported by States. However, again it is more the cost of the legal system itself than the cost of the individual situation of the protection of the immigrant's rights.

On a different level are the costs of social benefits that can be clearly identified and isolated. It is very clear how much tax payers pay for a medical operation or for the education of a given child.

However, as Stephen Legosmky states, immigrants do pay taxes; they pay more in total taxes than they receive in total public benefits in the US[389]. Lipman adds that "*undocumented immigrants living in the United States are subject to the same income tax laws as documented immigrants and U.S. citizens. However, because of their status most unauthorized workers' pay a higher effective tax rate than similarly situated documented immigrants or U.S. citizens. Yet these workers and their families use fewer government services than similarly situated documented immigrants or U.S. citizens*"[390]. In the US, and this is true in many

[389] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1464.

[390] FRANCINE J. LIPMAN, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation (2006), 5-6.

countries in the world, immigrants, including the undocumented, pay all sorts of taxes, including income taxes, sales taxes and property taxes. Legomsky says that "*aside from duration of the presence, work patterns, and tax payments, undocumented immigrants behave like other residents in additional ways. Using taxpayer identification numbers, they buy homes and obtain legal mortgages from banks. Their foreclosure rate is below the national average*"[391].

Francine Lipman establishes an interesting association with the claim "no taxation without representation". In fact, Lipman says, "*undocumented immigrants, like all citizens and residents of the United States, are required to pay taxes. Despite the historic and strong American opposition to taxation without representation, undocumented immigrants (except in rare cases) have not enjoyed the right to vote on any local, state or federal tax or other matter for almost eighty years. Nevertheless, each year undocumented immigrants add billions of dollars in sales, excise, property, income, and payroll taxes, including Social Security, Medicare and unemployment taxes, to federal, state and local coffers. Hundreds of thousands of undocumented immigrants go out of their way to annual federal and state income tax returns*"[392].

What these facts show is that the argument against the social protection, benefits and rights of foreigners cannot be of an economic nature as these persons, even the undocumented ones, contribute just as much as citizens contribute and, in some cases, even more.

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[391] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 150.

[392] FRANCINE J. LIPMAN, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation (2006), 4-5.

Enjoyment of social benefits is also perceived as a magnet for immigration, especially illegal immigration[393].

The truth is that migrants still come to the host countries regardless of the benefits, as long as they believe their financial situation and that of their families might be improved. This has happened in the past when migrants subject themselves to the dangers and uncertainty of coyote networks, exploitation in the workplace and virtually no access to social services[394]. Even in the cases of countries where some social rights are recognized for undocumented migrants, their legal situation makes it very hard to exercise those rights. I will come back to this later.

As Legomsky underlines, there are additional arguments usually used against the extension of social rights to undocumented migrants that are intertwined with their specific situation: "*the principal argument for withholding public benefits from undocumented immigrants is that they are not supposed to be in the United States at all. As wrongdoers, the argument runs, they have no moral claim to receive services from the very government whose laws they are transgressing. The analogy might be to a trespasser seeking support from the landowner whose property he or she has wrongly entered*"[395].

The argument might seem plausible and even strong. Why should we draw resources from the, often,

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[393] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1464.

[394] FRANCINE J. LIPMAN, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation (2006), 5-6.

[395] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1468.

unbalanced public budget to protect people that have breached the law?

This argument ought to be considered very carefully though. First of all, not all the undocumented migrants can *ipso facto* be considered wrongdoers. In some cases the legal situation is not yet settled and legal claims or asylum requests are pending[396].

Also, as Neuman upholds, "*there are different manners in which an alien's presence could be said to violate the law, and there are different forms of curative government action that may impart degrees of legality to the alien's presence. Many aliens enter or overstay for the purpose of working in the United States, but others act from a variety of motives: some seek asylum from persecution; some flee threats of death or injury that do not count as persecution under the asylum laws; some enter to join family members who are unlawful residents; some enter unlawfully while awaiting lawful admittance as a family member of a citizen or permanent resident. Some alien women are kept in unlawful status by husbands who could confer lawful status upon them but refuse for the purpose of maintaining control. Some "illegal" aliens entered the United States as young children without exercising any choice*"[397].

The last two examples abundantly prove the failure of the "wrongdoers" argument. A liberal democracy based on the rule of law simply cannot punish an undocumented migrant if the situation arose from an action of which that person had no knowledge or which

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[396] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1468.

[397] GERALD L. NEUMAN, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine (1994-1995), 1440-1441.

arose in the absence of his willingness (children) or under coercion (women kept under their husbands´ command).

Also, as Legomsky says, "*there are, in addition, degrees of moral and legal guilt. We do not assign equal opprobrium to all who violate our laws; if we did, all violators of all laws would receive the same penalties. Undocumented immigrants can be driven by a wide range of motives, including a desire to work, a desire to rejoin their families, or a desire to escape persecution. Laws are meant to be obeyed, but the beneficence of the violator's motives is surely relevant to the degree of culpability. That level of fault, in turn, should be balanced against the level of hardship that a deprivation of the particular public benefit would cause*"[398].

Finally, and related to these arguments, I would add that our criminal systems are based on the proportionality principle. A penalty must be proportionate to the gravity of the felony, the guilt of the agent and the ability of the penalty to deter future law-breaking. Also, a penalty shall not cause the society more harm than the one that it intends to prevent. Also, it shall only be exercised according to the rule of law when due process has been followed.

None of these principles is applicable to the argument according to which an undocumented migrant should be stripped of all social rights.

There is no distinction, whatsoever, based on the gravity of the action or the guilt. All undocumented migrants would be treated the same way.

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[398] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1469.

This does not prevent other law-breaking as it does not discourage other undocumented migrants from migrating to a country, as the above facts prove.

It is not a proportionate punishment and it is certainly not attached to any wrongdoing. Overstaying a visa or even crossing a border illegally has less social censorship than serious crimes such as rape, murder or terrorism. Yet, those who commit these crimes are not stripped of their social rights. If the felon is a citizen he will not be stripped of fundamental citizenship rights – except those closely connected with the felon condition, such as liberty or freedom of speech or, in some cases, the right to vote and stand for elections. Moreover, no liberal democracy would advocate that. The reason is simple: being stripped of freedom by being incarcerated is sufficient punishment to achieve the essential goals of the society. Unnecessarily denying other rights would not be proportionate, regardless of the crime committed.

If this is a solid line of thought for any felony, even the most serious ones, why should we think differently when it comes to undocumented migrants?

Also, from a collective standpoint, stripping undocumented migrants of social rights can be more harmful than recognizing them. In the event of a pandemic virus, for example, it is very important that everyone seeks appropriate healthcare. If we do not extend healthcare to undocumented migrants it is not expected that they will have that care in such an event. The same can be said about education. It is certainly harmful for a country to force part of its population out of the schooling system. Children of undocumented

migrant families will lack education and that will ultimately pose a problem to the society as a whole[399].

A leading case on the recognition of a social right to education for undocumented migrants' children is the Plyler v. Doe case, which was decided in 1982 by the US Supreme Court[400].

*"In 1975 the State of Texas enacted section 21.031 of the Texas Education Code, allowing its public school districts to charge tuition to undocumented children. The Legislature held no hearings on the matter, and no published record explains the origin of this revision to the school code. Discussions with legislators from that time suggested that it was inserted into a larger, more routine education bill, simply at the request of some border-area superintendents who mentioned the issue to their representatives"*[401].

The Plyler vs. Doe case was a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of the plaintiff children from the public schools of the Tyler Independent School District. The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-

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[399] STEPHEN H. LEGOMSKY, Immigration, Federalism and the Welfare State (1994-1995), 1470.

[400] Plyler v. Doe, 457 U.S. 202 (1982).

[401] MICHAEL A. OLIVAS, Plyler v. Doe, the Education of Undocumented Children and the Polity (2005), 197-220; from the same author see *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented Schoolchildren* (2012); HIROSHI MOTOMURA, The rights of others: legal claims and immigration outside the law (2009-2010), 1731.

defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined the defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on the plaintiffs' motion for permanent injunctive relief[402].

In June 1982 the Supreme Court struck down the statute by a 5-4 margin. Justice Brenan wrote the majority opinion based on the equal protection clause, saying that a State could not enact a discriminatory classification by defining a disfavored group as non-resident[403].

A first argument rejected was the financial argument. The State of Texas argued that the statute was aimed at preserving the limited resources for the education of its lawful residents. The Court decided, referring to a previous case – Graham v. Richardson[404] – that resources alone could not justify an alienage classification used in allocating welfare benefits. Additionally, any savings that might result from the statute enforcement would be small and uncertain and would not necessarily improve the quality of the overall education[405].

Another argument used by the State was that the legislation would prevent the flood of undocumented

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[402] Plyler v. Doe, 457 U.S. 202 (1982).

[403] MICHAEL A. OLIVAS, *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented Schoolchildren* (2012), 19.

[404] Graham v. Richardson, 403 U.S. 365 (1971).

[405] MICHAEL A. OLIVAS, *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented Schoolchildren* (2012), 19; HIROSHI MOTOMURA, The rights of others: legal claims and immigration outside the law (2009-2010), 1732.

aliens. The Court concluded that the objective was acceptable but not the means used: "*charging tuition to undocumented children constitutes a ludicrously ineffective attempt to stem the tide of illegal immigration*"[406].

The State also argued that children of undocumented migrants are not likely to stay in the country so the free education they would get would not contribute to the development of the society. The Court distinguished those who were in the State as a family and those who were not. For those who intended to maintain their home in the country, "*it is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation*". And the Court added that "*in addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority*" [407].

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[406] Plyler v. Doe, 457 U.S. 202 (1982); MICHAEL A. OLIVAS, *No Undocumented Child Left Behind: Plyler v. Doe and the Education of Undocumented Schoolchildren*, (2012), 20.

[407] Plyler v. Doe, 457 U.S. 202 (1982).

The decision of the Court presupposes here a very important idea: that undocumented migrants are residents. That is the only reason to sustain that undocumented migrants could get free education over citizens that are residents in other States or migrants lawfully applying from other countries.

As Legomsky puts it in a dialogued form, "*the only undocumented immigrants whom I favor classifying as in-state residents are those who have actually been living in the state. The noncitizens who apply from abroad for student visas are obeying the law, and that is admirable, but they are still charged the state's nonresident tuition rates for one obvious reason: they aren't residents of the state. The people I'm talking about are residents. And as I just explained, it's perfectly rational for a state to treat its own residents more favorably than the residents of other jurisdictions, whether the latter are U.S. citizens from other states or noncitizens coming from overseas*"[408].

This conclusion is very important for an argument that I will use later that favors residency over other connecting factors as a criteria for attributing citizenship. If undocumented migrants are residents for the purpose of social benefits they are certainly also residents for the purpose of citizenship.

However, for the moment, for the sake of the argument I am drawing from the Plyler v. Doe case, the Court concluded, without doubt, that the equal protection clause is applicable here. As Justice Brenan affirmed in the majority opinion, "*sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens,*

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[408] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 126.

*has resulted in the creation of a substantial "shadow population" of illegal migrants — numbering in the millions — within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law*"[409].

This line of thought of the US Supreme Court is very important and ought to be considered nowadays in many other situations; it is valid for a range of different situations and in different Nations. Indeed, it could well be adopted as a principle of global law in the sense that human dignity and equality are definitely at stake whenever a Nation decides to unlawfully discriminate against residents on the basis of their status. It is even more important because it was not delivered in an opinion about a case of life protection or a decision against torture; the Plyler case is a case about free elementary and secondary education, about social rights[410].

In liberal democracies the struggle of undocumented migrants is not so much for the recognition of rights – which, as I have shown before, they enjoy just because they are human beings – but also for the possibility of exercising them.

Even if it seems reasonable that an undocumented migrant enjoys rights such as freedom of expression, due process, right to emergency healthcare or right to

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[409] Plyler v. Doe, 457 U.S. 202 (1982).

[410] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 64.

education – as shown in Plyler, the ability to exercise these rights is not always evident[411].

Someone who finds himself undocumented in a given country is always facing the possibility of deportation. In fact, regardless of the reasons for being undocumented, deportation is a possibility unless we advocate open borders – which I do not[412].

If we accept generally, as a provision of international law, that a country has the right to decide whether or not to admit a foreigner within its territory, and if someone is found without documents we have to assume that that person is there without the proper authorization, this is grounds for the country's sovereign admission decision.

In fact, a visa – in whatever form we can conceive it – is a formal manifestation of that sovereign power to admit or exclude someone from the territory and of the conditions in which that person was admitted.

Someone without a visa is under the obligation – with all the legal guarantees and due process – to explain under what conditions he is claiming to be able to stay in the territory[413].

Yet this appears to contradict the possibility of exercising the rights described above, even the rights

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[411] LINDA BOSNIAK, *The citizen and the Alien: dilemmas of contemporary membership* (2006), 49.

[412] For compelling arguments in favor of the open borders theory see JOSEPH H. CARENS, Aliens and Citizens: The Case for Open Borders (1987), 251-273.

[413] I will not discuss here the due process applicable to the deportation nor concepts as expedited removal or waivers present in the visa waiver procedure. For a description and discuss of such procedures see STEPHEN H. LEGOMSKY and CRISTINA M. RODRIGUEZ, *Immigration and Refugee Law and Policy* (2009); THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN and HIROSHI MOTOMURA, *Immigration and Citizenship: Process and Policy* (2008).

protected in the core human rights instruments within the UN system or the rights provided for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

How will an undocumented migrant seek healthcare or education for his children if deportation is always pending? Wouldn´t an undocumented migrant avoid, at all costs, benefiting from, for example, emergency healthcare, putting himself in danger in a life threatening situation, or even the whole society in a pandemic situation, if deportation is a real possibility?

Linda Bosniak has identified this problem as one of the main practical obstacles within the framework of the Convention[414].

There are two main answers to this difficulty: guaranteeing the exercise of rights without a deportation risk by preventing authorities from reporting the immigration status to the immigration officials; a solid and permanent legalization program.

The first option finds its roots in the sanctuary laws of the 1980s[415]. The origins of the sanctuary laws were the will of private institutions and churches to protect Guatemalans and Salvadorians that were believed to be refugees and whose situation could represent a breach of the international refugee law[416].

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[414] LINDA BOSNIAK, Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention (1991), 760.

[415] HUYEN PHAM, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power (2006).

[416] STEPHEN H. LEGOMSKY and CRISTINA M. RODRIGUEZ, *Immigration and Refugee Law and Policy* (2009). Mentioning a similar possibility in Europe see GREGOR NOLL, Why Human Rights fail to protect undocumented migrants (2010), 248 - 258.

As Huyen Pham describes it, "*cities and states also joined the movement, passing "sanctuary laws" that declared asylum seekers could remain in their boundaries without fear of arrest by local law enforcement for immigration violations. Many of the sanctuary policies also contained provisions that prohibited local police from reporting immigration information to or otherwise cooperating with federal immigration enforcement.*

*At the height of the movement, approximately 23 cities and four states participated. Cities that passed sanctuary laws included Rochester, NY; Minneapolis, Minn.; Seattle, and Chicago; states that passed such laws included New Mexico, Massachusetts and New York.*

*Typical of the sanctuary laws was that passed by Takoma Park, Maryland in 1985. In a resolution, Takoma Park expressed its belief that the United States has a responsibility under international law not to deport refugees back to places of persecution, that the United States violated international law by denying asylum to Guatemalan and Salvadoran refugees, and finally, that the individual volunteers in the sanctuary movement and the movement as a whole deserved government support. In its law, Takoma Park prohibited its employees from assisting or cooperating with the INS in any investigation of immigration violations, from inquiring about the citizenship status of any resident, and from releasing the citizenship status of any resident to the INS*"[417].

Of course the concept of sanctuary cities evolved from the protection of the refugees to the protection of

[417] HUYEN PHAM, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power (2006).

undocumented migrants. It is now basically applicable to the cities where by law, local ordinance or practice the public officials are forbidden from reporting or, at least, allowed not to report the immigration status of undocumented migrants. In some cases they are not even allowed to ask about the immigration status of anyone.

First of all, it can be a decision to avoid racial and national discrimination[418]. It is certainly true that any official would not be compelled to ask for the immigration status of anyone who *looks and sounds* like a national. This is typically the kind of question that arises whenever the official is convinced that the person is not a national. In a first approach, this can only be based on race, language or other suspicious categories according to the equality clause. In a way, denying that possibility to some officials is, in a way, a protection for the equality clause.

Then we should distinguish between different kinds of officials. Here we could be thinking of civil servants, such as those who work for the social security services or even law enforcement officials like state police or troopers.

The latter category has drawn a lot of attention and controversy, especially after September 11th [419]. It was deemed inadmissible for local police authorities to collaborate in hiding potentially harmful people from the federal authorities[420].

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[418] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 83.

[419] HUYEN PHAM, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power (2006).

[420] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 82.

In November 1994 the electorate of California adopted Proposition 187. The purpose of this proposition was to provide for cooperation between the agencies of state and local government and the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California. "*Proposition 187 restricted undocumented aliens' access to public services, including education and non-emergency health care; it required state and local law enforcement, social services, health care and education officials to verify the immigration status of persons with whom they came in contact and to report to the INS persons suspected of being unlawfully in the United States; and it imposed criminal penalties for the manufacture, distribution, sale, or use of false citizenship or permanent residence documents*"[421].

Proposition 187 was dropped shortly after its approval and did not make its way to the Supreme Court, giving the judges an opportunity to revisit Plyler v. Doe[422]. In fact, in March 1998, a federal judge in Los Angeles struck down Proposition 187[423].

In 1996 the passing of the Illegal Immigration Reform and Immigrant Responsibility Act challenged the "sanctuary cities" policy. It directly addressed the relationship between local and federal authorities on immigration issues and banned several protections of

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[421] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN and HIROSHI MOTOMURA, *Immigration and Citizenship: Process and Policy*, Thomson (2008), 1166.

[422] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN and HIROSHI MOTOMURA, *Immigration and Citizenship: Process and Policy*, Thomson (2008), 1168.

[423] OWEN M. FISS, The Immigrant as Pariah (1999), 5.

local authorities regarding the immigration status of residents[424].

In August 1997, Congress enacted legislation to restore certain benefits like food stamps to some categories of migrants, such as children, the elderly and the disabled[425].

First and foremost, the discussion about sanctuary laws is deeply intertwined with the discussion about federal and state powers. The discussion and also the consequences of a sanctuary policy are far more visible in a federal state.

Yet the discussion is still valid, firstly because the United States is the country where undocumented migration is a more visible and tangible problem– estimates point to a population of more than 12 million undocumented migrants[426]. Secondly, Europe, where this issue is soon to take on greater proportions, is very close to a federal entity with harmonized immigration regulations, with regard to undocumented migration. Finally, even in non-federal States the sanctuary response is applicable since it is conceivable to design a system where some officials – in educational or healthcare institutions – would not be permitted to report the immigration status to other officials – the immigration officials.

As Legomsky underlines, even from the law enforcement standpoint the sanctuary policy allows

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[424] HUYEN PHAM, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power (2006), 1384; VICTOR C. ROMERO, Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls (2002); qualifying it as "far more severe than Proposition 187", OWEN M. FISS, The Immigrant as Pariah (1999), 6.

[425] OWEN M. FISS, The Immigrant as Pariah (1999), 6.

[426] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 67.

undocumented migrants to report crimes and cooperate with the police without an immediate fear of deportation[427].

Of course the relationship with the police is a more controversial one. It might be easier to admit such a policy when applied to officials working in other environments like schools, social security or hospitals. It is harder for many people to conceive that a law enforcement officer like a policeman would be barred from investigating a person's immigration status. Again, it might be easier to admit such a system in a federal State with different layers of law officers.

However, this can be said even in non-federal States. It is often the case that police officials are specialized according to areas of intervention. There is no specific reason why a traffic policeman would investigate the immigration status of a person even if a misdemeanor like speeding is being committed. There is no relationship between such an action and the immigration status. In fact, there is no need to ask for the immigration status in a traffic control action and any further measure that could lead to deportation seems disproportionate given the type of action being controlled.

Of course one can always say that more serious crimes can be found during routine searches like the traffic operations. Yet it is also true that a routine traffic operation does not empower the police officer to search the drivers to any extent. It does not allow, for instance, a full inspection of the car, which is protected under privacy laws, unless there is a probable cause of a crime. If that is true for crimes like murder or drug trafficking, would we support a different approach for

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[427] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 83.

an undocumented migrant? If a traffic police officer cannot search any car randomly for drugs or concealed illegal weapons, can he search for an undocumented migrant?

There is a tendency, even in discussions, to associate the undocumented migrants with criminal activities. The legal system promotes that association since it has evolved in the direction of criminal law regulation of the immigration law. As Legomsky affirms, "*there is an embryonic literature on the growing convergence of two critical regulatory regimes--criminal justice and immigration control (...) The two systems intersect at multiple points: Violations of the immigration laws trigger broader, harsher, and more frequent criminal consequences. Indeed, it is no longer rare for refugees seeking asylum to be criminally prosecuted for illegal entry. Conversely, Congress has steadily expanded the list of non-immigration-related crimes that trigger deportation and other adverse immigration consequences, and the sheer numbers of deportations on crime-related grounds have skyrocketed*"[428].

In the same tone, Daniel Kanstroom says that before September 11th immigration law was deemed to be civil, not criminal law. That changed afterwards not only due to the influx of the "*so called USA PATRIOT ACT but also to an increasing convergence between criminal justice and immigration control systems, part of a trend that has been evident since the late 1980s*"[429].

In fact there is no direct or necessary relationship between immigration law and criminal regulation.

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[428] STEPHEN H. LEGOMSKY, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms (2007), 471.

[429] DANIEL KANSTROOM, Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law' (2003-2004), 639.

Undocumented migrants might have breached the law at some point but it does not make them criminals, as I have previously demonstrated.

Legomsky advocates that there is an asymmetric incorporation of criminal justice norms in the immigration law and urges "*a return to the civil regulatory model of immigration law-for enforcement and adjudication alike. Only then can we hope to devise an immigration policy that is at once balanced, moderate, fair, humane, and, ultimately, faithful to all the values that together constitute the national interest*"[430].

Also connected to this trend, and showing the importance of actions like those the sanctuary cities have adopted, is a method of expelling undocumented migrants known as "attrition through enforcement".

The idea behind this scheme is to make immigrants´ lives so difficult that they will choose to self deport[431].

Kris Kobach advocates this strategy as a third way in between unilateral deportation and legalization. For this author among the many advantages of this strategy is its relative inexpensiveness[432]. The analogy used is with speeding on a highway and the need to reinforce patrols in a highway area where drivers usually speed. According to Kobach, in no area of law is it acceptable to give up controlling law breakers. The proposed strategy would be to control every step of the undocumented migrants, denying them any social rights and tightly controlling employment of these migrants.

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[430] STEPHEN H. LEGOMSKY, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms (2007), 528.

[431] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 103.

[432] KRIS W. KOBACH, Attrition through Enforcement: A Rational Approach to Illegal Immigration (2008).

To Kobach, "*what would a nationwide strategy of attrition through enforcement entail? Properly conceived, it would involve several steps: (1) mandating that all employers in the country use the E-Verify system to verify the work authorization of new employees (…); (2) increasing the removal rate of aliens who have not been convicted of serious felonies; (3) increasing the percentage of aliens who are detained during removal proceedings to reduce the number of absconders; (4) increasing the number (…) agreements between ICE and state law enforcement agencies;(5) ending sanctuary cities by denying federal law enforcement funding to cities that violate 8 U.S.C. § 1373(a)-(b);21 and (6) increasing the number of ICE interior enforcement agents*"[433].

In a way it is the reverse approach to the sanctuary cities. That is why ending sanctuary cities is a key part of the attrition through enforcement strategy.

Again it departs from a criminal law conception of the immigration law and of undocumented migrants as criminals.

The sanctuary cities approach is based on the idea that the only way to guarantee the exercise of rights by the undocumented migrants is to assure that deportation will not follow automatically. Migrants are not expected to report crimes, seek healthcare or education if they know they will immediately be deported.

The possibility of having these rights is very important, not only for the migrants themselves, as we are thinking about rights protected by the core UN instruments on Human Rights, but also for the society as a whole. And this is at stake here.

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[433] KRIS W. KOBACH, Attrition through Enforcement: A Rational Approach to Illegal Immigration (2008), 159.

It is not comparable to speeding on the highway. First of all, speeding is not a right; it is a violation of the law. Then, there is no collective reason to encourage speeding. Finally, the consequences of enforcing speed limits can only be the reduction of speeding on highways and ultimately drivers' safety. Of course there might be a general beneficial effect related to law enforcement, also applicable to immigration law, but in this case it can be counterproductive when compared with the costs of such action.

A system designed to prevent the enjoyment of rights of undocumented migrants is a violation of international law. It harms the migrants' rights and might be harmful for the society. It might achieve a limited objective of self-deportation, but this is by far outweighed by the negative consequences it brings.

A sanctuary cities approach does not ignore the enforcement of immigration law. There is no prohibition or obstacle to the activity of the immigration officers. They can still investigate and, if it is the case, deport those who breach the law. Yet, it certainly does not encourage such activities and, above all, promotes an environment where the undocumented migrants' rights can be safely enjoyed.

Apart from the sanctuary strategy, a solid legalization process seems to be an adequate method of protecting the rights of undocumented migrants.

This is a highly controversial issue. Those who oppose undocumented migrants' rights usually use the phrasing "amnesty" rather than legalization because they simply consider it as a reward for the law breakers, an amnesty for their past wrongdoings[434].

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[434] For a very interesting debate on the perspectives over legalization see STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 92-103.

The key factor in any legalization process is the recognition that certain undocumented migrants are in fact part of the national community, contribute to its development, raise a family, and are, in a word, residents.

It is also necessary to recognize that from a practical standpoint and even bearing in mind the interests of any internal market, deportation of a large part of the population is simply not possible.

Then, as an alternative to the sanctuary cities approach, where deportation is always pending as described above, legalization is definitely a possibility.

There are compelling legal arguments in favor of legalization. First of all, as said before, undocumented migrants residing permanently in a given territory ought to be considered as residents.

Because of the permanence of their presence and the time they have spent in the territory some authors find an interesting analogy with adverse possession in property law[435]. I will come back to this analogy to advocate the adverse possession theory applicable to the acquisition of citizenship.

In fact, as Carens puts it, "*the moral right of states to apprehend and deport irregular migrants erodes with the passage of time. As irregular migrants become more and more settled, their membership in society grows in moral importance, and the fact that they settled without authorization becomes correspondingly less relevant. At some point a threshold is crossed, and irregular migrants acquire a moral claim to have their actual social membership legally recognized. They should acquire a legal right of permanent residence and all the*

[435] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 95.

*rights that go with that, including eventual access to citizenship*"[436]. I will come back to the citizenship argument later.

Legalization (or regularization) processes have been implemented successfully in many European countries.

Arguments that can be listed in favor of legalization are that it reduces the size of the undocumented immigrant population at an acceptable cost, it enhances security and reduces crime and it brings significant benefits to legal immigrant communities, with spill over gains for the health and vibrancy of the broader society. Additionally, legalization programs offer important economic and social benefits by moving immigrants from the informal economy to the formal one[437].

The European experience shows various qualifications – rules defining who is eligible for legalization – for the legalization process, such as migration history (Germany), employment record (Austria, France, Greece, Italy, The Netherlands, Portugal, Spain)and humanitarian basis (Austria, Belgium, Denmark, France, Germany, The Netherlands, Sweden, UK)[438].

Although legalization might be perceived as a reward for those who have broken the law, there are some countervailing benefits for society. First of all, it is a way of including undocumented migrants that have been living in the community for a long time. It is an

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[436] JOSEPH H. CARENS, The Case for Amnesty: Time Erodes the State's Right to Deport (2009), 7-8.

[437] MARK R. ROSEMBLUM, *Immigrant legalization in the United States and European Union: policy goals and program design* (2010).

[438] MARK R. ROSEMBLUM, *Immigrant legalization in the United States and European Union: policy goals and program design* (2010).

inclusive measure. Then, by being inclusive, it integrates migrants that had been living as pariahs until then. It allows them to benefit from the rights that international law recognizes and to collaborate with the State's authorities in any law enforcement programs or actions. Finally it solves a number of pragmatic questions including finding a path to citizenship[439]. I will come back to this in chapter 6.

[439] As Legomsky suggests, "for views skeptical of the moral claim but sympathetic to legalization on pragmatic grounds, see T. Alexander Aleinikoff, BOSTON REV., May/June 2009 at 11, 11 (finding pragmatic arguments for legalization most persuasive), Peter H. Schuck, BOSTON REV., May/June 2009 at 13, 13 (advocating amnesty despite lack of moral clarity), and Gerald L. Neuman, BOSTON REV., May/June 2009 at 16, 16 (favoring amnesty for reasons of both "humaneness and pragmatism")" STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 95.

## §4. The rights of non-citizens: the right to vote

As I have stated above, one of the reasons for a trend of thought that diminishes the importance of citizenship and points to its decline is the fact that most rights are inherent to personhood and not to citizenship. Very few rights can be exclusively connected to citizenship, and one of those is voting rights. Even so, Jacobson says that "*in the political arena, citizenship is essential for coting in national elections (...) the effect of the disappearing distinction between citizen and alien is that resident aliens display little interest in citizenship status*"[440].

In fact, very few rights can be deemed as exclusive to citizens. Political rights and the right to freely enter and remain in the nation´s territory can probably sum up the complex of rights that are within that exclusivity.

Yet there are theoretical proposals and practical experiments to extend some of these rights to non-citizens[441].

Examples of non-citizen voting rights can be found in Europe and in the United States[442]. As Raskin describes, "*at any rate, local alien suffrage has made much headway in the last several decades, especially in*

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[440] DAVID JACOBSON, *Rights across borders: Immigration and the decline of citizenship* (1996), 39.

[441] GERALD L. NEUMAN, *Strangers to the Constitution. Immigrants, Borders and Fundamental Law* (1996), 141.

[442] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN and HIROSHI MOTOMURA, *Immigration and Citizenship: Process and Policy* (2008), 1093-1094; HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 191.

*Europe. In 1975 Sweden adopted voting rights in local and regional elections for foreigners living in the country for three years". In 1977 Denmark enacted a local alien suffrage policy for Nordic immigrants which has since been extended to give the right to vote and hold local office to all immigrants of three years residence. Norway changed its constitution to accomplish noncitizen voting in 1978, and now all immigrants of three years residence may vote. Both Finland and Iceland have extended local voting rights to Nordic citizens. The Netherlands accomplished local voting rights for all immigrants in the early 1980s. And, in Switzerland, two cantons have written local alien suffrage into their constitutions. A local alien suffrage provision has also appeared in the new Constitution of Estonia*"[443].

At the European Union level, the Treaty on European Union provides for a right to vote in local elections. Article 19 of the Treaty establishes the following:

"*1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State".*

[443] JAMIN B. RASKIN, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage (1992-1993), 1461-1466. These rights are only recognized to lawful residents.

This is included in the catalogue of EU citizenship rights. This means that an EU citizen residing in an EU member state other than that of his nationality is allowed to vote and stand for office in municipal elections.

It should be noted though that this is not the typical situation of extending voting rights to aliens. In fact it was designed as part of the citizenship status that I have described above. In that sense, it is a weak right because it is supposed to be the content of a citizenship status.

Although the European Union is not a federal entity, it has, as I have described, some federalist aspects, and European citizenship, as I have classified it, is a good example of transnational citizenship. In any event, it is far from being a simple extension of voting rights to aliens.

Also, and even in this context, the only voting rights that have been extended refer to local elections. EU citizens are still barred from participating in major elections – like elections to national legislative parliaments and executive branches – in an EU country other than that of their nationality.

Other examples of alien voting rights, like the ones in the United States, show that these rights are typically limited to local elections. It is the case of the New York City community school board elections and the Chicago local school council elections. Residents, including some non-citizens, may vote in local elections in several Maryland communities[444].

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[444] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN and HIROSHI MOTOMURA, *Immigration and Citizenship: Process and Policy* (2008), 1093; HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 191.

The theoretical reason for this claim is the need to fully integrate resident migrants and to, according to the democratic principle, allow all the residents to participate in community life and its political organization[445].

A foundational article on this claim was written by Gerald Rosberg in the 1970s. A first line of argumentation derives from Plessy v. Fergusson and the idea of alienage as a suspect category under strict scrutiny according to the equal protection clause. Rosberg says that discriminating against aliens on voting rights would fall under this scrutiny because alienage is the criteria for the discrimination[446].

One of the advantages of his claim, for Rosberg, is that conferring voting rights on aliens would eliminate that suspect category. By being able to vote, foreigners would be protected from the discrimination and would be able to participate in the decisions that could potentially be harmful for them.

Although compelling, this argument does not seem too convincing. It is not because voting rights are held that a certain category is not suspect. Race is certainly a suspect category while racial minorities hold voting rights. A suspect category is characterized as protecting a group that is traditionally discriminated against – for a variety of reasons – and is typically a minority in the sense that it has no significant political power or influence over political decisions. In that sense, foreigners, regardless of their voting rights, will always be a minority. And as long as they are so, alienage cannot be excluded from the suspect categories.

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[445] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 193.

[446] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1092.

Then Rosberg says that excluding a part of the population from the political process means withholding the right to vote and the political power that would enable persons and groups to protect themselves in the legislative forum. Also under the equal protection clause, such discrimination should be under strict scrutiny[447]. Rosberg acknowledges though that his claim blurs the distinction between citizens and aliens[448].

I do not think that the reason voting rights are attached to citizenship is to maintain an artificial distinction between migrants and citizens or for symbolic purposes. The reason is more profound. It is connected to the social contract, to the fundamental societal organization. In a democratic society, in a liberal democracy the members of the polity ought to also be its rulers. A liberal democracy cannot tolerate a situation where active members of the society are prohibited from participating in the collective decisions.

On the other hand, only effective members of the polity should be allowed to participate politically. An exception to this rule would dilute the political power among non-active members of the society and reduce the effective power of the others. That is why residency, in some cases more that citizenship, is the key criteria to hold voting rights.

So, to go back to Rosberg's claims, if we apply a strict scrutiny to discrimination against aliens related to voting rights, we will end up with this dilemma: either the discrimination is justified because they are not considered effective members of the polity or the

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[447] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1107-1109.

[448] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1132.

discrimination is unacceptable because their membership is evident. In the first case, the discrimination is appropriate. In the second it would be considered a breach of fundamental principles such as the equal protection clause and the democratic principle.

This dilemma cannot be solved in abstract. A criterion is needed to solve it. Underlying the reasoning of the authors that call for voting rights to be extended to aliens is the idea of lawful residence[449]. Rosberg distinguishes resident aliens from transients. "*the transient's interest, though often substantial, is distinguishable from that of the resident, whether citizen or alien, because the transient will predictably have a different view of short-run benefits and long-run costs than will persons who intend to reside in the community indefinitely. Drawing lines on the basis of that distinction is difficult, and the courts have recognized the potential for abuse where the label of transiency is casually applied. They have viewed with increasing skepticism state claims that particular segments of the population, students for example, are just passing through and lack a sufficient stake in the community to deserve the vote. In the case of resident aliens (as opposed to nonresident aliens), there can be no doubt that the transient label is inappropriate. Resident aliens have the same stake as citizens in the long-range welfare of the communities in which they live. They may, to be sure, move from one community to another, and some will return to their country of origin. But citizens also move, and I know of no reason to believe that resident aliens have a higher rate of*

[449] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1118; THOMAS ALEXANDER ALEINIKOFF, Citizens, Aliens, Membership and the Constitution (1990), 23.

*mobility than other persons. Like citizens (and unlike nonresident aliens), their right to remain in their communities is unlimited by any state or federal law. They are not subject to removal at the caprice of government officials. They can be deported, of course, but only by action of the federal government and only under exceptional circumstances. If the resident alien is a transient because of the possibility of deportation, then citizens should also be considered transients because of the possibility of removal to prison upon conviction of a crime*"[450].

Then one can assume that residency is the key factor in determining the attribution of voting rights to aliens – maybe because we are now referring to residents, migrants would be a more qualified word. Yet if residency is the key factor, how can we establish that these rights can only be extended to documented migrants? It seems clear that undocumented migrants are also residents[451].

We might then conclude that all residents should be entitled to some citizenship rights, including the right to vote. Again, it is necessary to define residency. For Rosberg, "*a resident alien is an immigrant admitted to the United States for permanent residence, entitled to work and live anywhere in the country*". The key factor in this definition is permanent residence which implies a sense of stability and physical presence. In this sense it is very similar to the concept of *ius domicilii* that I will later develop.

Rosberg acknowledges that "*resident aliens are on a citizenship track-after five years they are eligible for*

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[450] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1113.

[451] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 126.

*naturalization. Their right to remain in the United States does not depend, however, on their obtaining citizenship. They serve in the armed forces and were subject to conscription under the selective service laws*"[452]. And he adds "*resident aliens drive on the same highways as citizens, pay the same taxes, breathe the same air, require the same police and fire protection, and send their children to the same schools. To deny them the right to vote is, in the language of Kramer, to leave them without "any effective voice in the governmental affairs which substantially affect their lives*"[453]. Or, as Aleinikoff puts it, "*permanently residing aliens live and function much as citizens. They hold jobs, attend churches, send their children to school and pay taxes. Children they give birth here are United States citizens. From this perspective, the fact that aliens are not required by law to apply for citizenship is not surprising, in day to day terms, permanently residing aliens and citizens are already virtually indistinguishable*"[454].

If the criterion for extending voting rights to migrants is permanent residency (or *ius domicilii* as I prefer to call it) why not extend the whole citizenship status to these migrants rather than slicing it and serving in portions?

Even the traditional difficulties that Rosberg lists as the main reasons for denying aliens voting rights – *Vote Fraud; Bloc Voting, Lack of Knowledge Needed To Vote Intelligently and Disloyalty* – would be easily

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[452] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1110.

[453] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1112.

[454] THOMAS ALEXANDER ALEINIKOFF, Citizens, Aliens, Membership and the Constitution (1990), 23.

solved by the naturalization process. In fact, none of these obstacles can be raised after naturalization because they cannot be opposed to full citizens. On the contrary, subjecting migrants to a harder process to be able to vote – such as a separate language and culture test, as Rosberg seems to propose – would be a breach of the equal protection clause. The answer that could clearly and easily overcome these identified obstacles is naturalization.

Rosberg would counter argue saying that "*the citizenship qualification for voting is undeniably a form of durational residence requirement. And it is a requirement of exceptional severity, since immigrants are ordinarily ineligible for citizenship until they have resided in the United States for five years*"[455].

I do not oppose a transitional concept of extending rights to migrants that has been called for by Hiroshi Motomura "migrants as citizens in waiting"[456]. However, I think this concept is only admissible in a liberal democracy if seen as transitional. Aleinikoff says that immigration law serves "*both as a quantitative and qualitative screen and that naturalization, in this scheme, bestows full membership*"[457]. Some rights – even voting rights – can be granted in advance and other rights will only come with full citizenship. The danger of adopting a theory such as the one that calls

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[455] GERALD M. ROSBERG, Aliens and Equal Protection: Why Not the Right to Vote? (1976-1977), 1118. On a slight different perspective, asserting that naturalization is easy, THOMAS ALEXANDER ALEINIKOFF, Citizens, Aliens, Membership and the Constitution (1990), 15.

[456] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006).

[457] THOMAS ALEXANDER ALEINIKOFF, Citizens, Aliens, Membership and the Constitution (1990), 15.

for an extension of voting rights to migrants without the transitional idea is that it is used as a scheme to avoid granting full citizenship or that it contributes to the devaluation of citizenship.

## §5. Migrants as citizens in waiting

Immigration can be seen as a transitional phase from alienage to citizenship. Seen from that perspective, immigration law establishes a path to citizenship[458].

Hiroshi Motomura has eloquently called it "citizens in waiting"[459]. Motomura distinguishes three views of immigration: i) immigration as transition; (ii immigration as contract; iii) immigration as affiliation[460].

Immigration as transition treats lawful immigrants as citizens in waiting, as if they would become American citizens. It confers immigrants a presumed equality. Motomura argues that this is a view that dates back to early American times but that has somehow been abandoned. According to Motomura, "*we treat new immigrants as outsiders until shown otherwise. They may later become citizens, but we no longer treat them as if they will*"[461].

Immigration as contract adopts a core idea that immigrants have a set of expectations and understandings of their new country. It does not rely on a formal concept of contract as an agreement with two

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[458] On a similar note see THOMAS ALEXANDER ALEINIKOFF, Citizens, Aliens, Membership and the Constitution (1990), 15.

[459] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006).

[460] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 9-10.

[461] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 9.

parties and signatures. It also acknowledges the limited bargaining power that immigrants have in the contractual process. Immigrants are in a take it or leave it position before this contract. Rather, immigration as contract is more related with ideas like fairness and justice that are normally associated with contracts. Despite being a model of justice, immigration as contract does not confer equality itself. It also departs from the idea that simply being present in the United States bestows certain minimum rights on lawful immigrants and other non-citizens. This is what Motomura calls territorial personhood[462].

Immigration as affiliation is an evolution of territorial personhood. According to this view, the treatment of lawful immigrants and other non-citizens should depend on the ties they have formed. This view on immigration is dependent on the existence of ties such as family, tax payments, and children with citizenship, and on whether the immigrants have shown themselves to be reliable and productive workers. It can also be described as earned equality[463].

In the words of Cristina Rodriguez, "*Motomura brings to light a paradox that has become increasingly apparent over the last decade. In a globalizing world marked by heightened migration and transnational forms of association, we still need robust conceptions of national, geographically anchored citizenship to promote social cooperation*"[464].

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[462] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 10.

[463] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 10-11.

[464] CRISTINA M. RODRIGUEZ, The Citizenship Paradox in a Transnational Age (2008), 1111.

A first conclusion that must be drawn from this theory is that it is far from the ideas of devaluation of citizenship. On the contrary, the citizens as migrants approach cherishes citizenship as something valuable, as something that it is worthy waiting for. In fact, in order for this theory to make sense, it presupposes that a main objective of any migrant is to obtain citizenship or, at least, that the immigration path is a path to citizenship.

In that direction, Motomura claims for a return to the view on immigration as transition. A return because, according to this academic, this was an American tradition. In that sense, those who were considered intended citizens, because they declared the intention of becoming citizens would possess many citizenship rights, including voting rights[465].

Immigration as transition means that an immigrant is, from the moment that he is present in the country, in a transitional process, on a path to citizenship. Motomura clearly states that naturalization should be the goal of immigration[466].

Motomura recognizes that "*the current naturalization requirements are undemanding for many who apply, and for them the transition to citizenship can be easy and routine. For other potential citizens, however, the requirements and procedures pose serious*

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[465] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 116-19; CRISTINA M. RODRIGUEZ, The Citizenship Paradox in a Transnational Age (2008), 1112-1113.

[466] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 142-47; CRISTINA M. RODRIGUEZ, The Citizenship Paradox in a Transnational Age (2008), 1116.

*obstacles*"[467]. And, he adds, "*naturalization requirements and naturalization rates do not tell the whole story, of course. Any look at naturalization to assess the influence of immigration as transition needs to dig deeper than the acquisition of formal citizenship status*"[468].

As Cristina Rodriguez recognizes, "*a framework for belonging that does not depend on having formal citizenship status but that nonetheless possesses many of the attributes of strong national citizenship remains viable—indeed, it is an essential concept. Motomura reminds us of our continued need for a simultaneously robust and inclusive conception of citizenship. In a globalized world, we still need expansive conceptions of national citizenship to promote social cooperation and create incentives for civic engagement, even among migrants whose intent is not to resettle permanently*"[469].

A way to look at the phenomena that Motomura describes is to extend rights to migrants. Extending to them the set of human rights and some citizenship rights, such as voting rights, would move in a similar direction. It would not, however, achieve the inclusive goal of attributing citizenship, nor would it treat immigration as a citizenship path.

A possible criticism of Motomura´s theory is that it does not consider the reality of globalization, of frequent migrations and multiple attachments, which

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[467] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 143.

[468] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 144.

[469] CRISTINA M. RODRIGUEZ, The Citizenship Paradox in a Transnational Age (2008), 1116.

Cristina Rodriguez calls transnationalism and fluidity[470].

In that sense, slicing citizenship rights and delivering them to different classes of migrants would solve the problem. However, I don't deny that an elaboration of Motomura´s theory might be able to answer the same problem.

In fact, if globalization shows us anything, it is that there is no single profile of a migrant. There are people that migrate to settle and raise families and others that migrate temporarily for a job or a specific task. We should also consider the fairly recent phenomenon of the "expats", that is highly trained young professionals that work for multinational companies and that are typically relocated in the early stages of their careers. These relocations are usually temporary and highly unstable, it being common to rotate at a fast pace, often based on merit. Different to the idea of merit, maybe emphasizing the idea of earned equality expats change country sometimes at the pace of their success.

Nothing in this example contradicts Motomura´s theory. On the contrary, it shows that there are many types of migrants and that no single answer is adequate for them all. Maybe some of them are not interested in acquiring citizenship, but most are. Not all of them will eventually walk the citizenship path, but it should be there for those who seek it.

Thus rights of migrants should be regarded in a variable geometry format. Immigration should be regarded as a citizenship path, with naturalization down the road, where migrants are able to enjoy some rights

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[470] CRISTINA M. RODRIGUEZ, The Citizenship Paradox in a Transnational Age (2008), 1117.

on the way. The closer they get to naturalization, the stronger these rights can be.

Underlying this allegory is clearly the idea of residence. The path means being there, residing, paying taxes, raising a family. These are all path marks. Length of residence is what crafts the path.

Linda Bosniak makes the case for a normative idea of territoriality that she calls ethical territoriality. By ethical territoriality she means the "*conviction that rights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence*"[471]. This departs from the idea that rights are universal and that their application should be extended to all persons within the territorial jurisdiction. It does not mean, however, that citizenship is irrelevant[472].

A trend of thought common to these scholars is the idea of presence attached to the enjoyment of rights. Given the fact that it is not legally possible – according to both international law and constitutional law in liberal democracies – to deny fundamental rights to migrants – as I have stated above – authors must elect a criterion for extending the rights and for what kinds of rights should be extended.

Again, it can bring us to an extension of some citizenship rights – eventually leading to the devaluation of citizenship – or to an idea of ethical territoriality – thus calling for a general extension of rights to all of those who are present – or to the migrants as citizens in waiting approach.

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[471] LINDA S. BOSNIAK, Being Here: Ethical Territoriality and the Rights of Immigrants (2007), 389-90.

[472] LINDA S. BOSNIAK, Being Here: Ethical Territoriality and the Rights of Immigrants (2007), 394.

The last two visions differ in one very important aspect: while the ethical territoriality theory is applicable to all migrants, including the undocumented, the migrants as citizens in waiting approach, at least as Motomura describes it, is limited to lawful migrants. When describing immigration as a transition Motomura is very careful to always insert the word "lawful", leaving no doubt that undocumented migrants have no room in his theory.

That is probably the main limitation of this theory. It promises more than it delivers. Arguing that migrants should be seen as citizens in waiting does not seem to be too much of a claim, especially in countries where there are clear, predefined, legally established naturalization rules.

Of course Motomura´s theory is still very important in preserving the importance of the citizenship status and revitalizing it in a global age. That alone justifies his theory.

Also it is very important to conceive – and our societies have long given up that conception, as Motomura acknowledges – of immigration as a transitional process to citizenship.

This concept is particularly important because it allows us to reconstruct that very path by creating rights along the way that migrants can enjoy. That will certainly help overcome some of the problems I have identified above.

It does not help solve a central problem of our societies that is the theme I am analyzing in this chapter: the rights of undocumented migrants.

If undocumented migrants are not on the path to citizenship, what kind of rights do they have? Will they be indefinitely excluded from access to citizenship?

None of these questions are answered by Motomura´s theory if it is read in the sense that undocumented migrants are not citizens in waiting.

Yet if we change this approach to ethical territoriality and to an idea that I have called *ius domicilii* or residence, we might conclude – and this is not contradictory to the citizens in waiting approach – that residence is the criterion for the recognition of rights.

Permanent residence is needed for the recognition of rights that are not strictly inherent to personhood – that should be recognized for all human beings – like some of the social rights. The example here could be education – the US Supreme court extended it to undocumented migrants, in *Plyler*. It is fairly consensual that it should be extended to all migrants, but some sort of residency must be accrued.

So if we agree that residence or permanent residence is the criterion for extending rights – and this is the criterion for the migrants as citizens in waiting theory[473] – to migrants, and if we agree that undocumented migrants are residents[474], then we have to conclude that undocumented migrants are citizens in waiting on the path to citizenship.

I will later discuss this idea and its consequences in more detail by also identifying a current trend derived from international law and liberal democratic principles to establish a fundamental right to citizenship of all the migrants.

The evolution of these ideas to the point where a trend like the one I have just described, and will later

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[473] HIROSHI MOTOMURA, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States* (2006), 139-142.

[474] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 126.

elaborate on, can be identified was only possible due to the identification of the many flaws in the attempts to deny rights to migrants and, especially, to undocumented migrants.

## VI – The right to citizenship

### §1. Expectations

The moment a migrant sets foot on the soil of a country which is foreign to him, he has a number of different expectations regarding that country.

Among those expectations is the acquisition of citizenship, down the road after a residence period, at least for those planning to establish a long-term relationship with the said territory.

This particular expectation is common to both documented and undocumented migrants, maybe even more so for the latter. As I have stressed above, citizenship is a powerful integration tool and migrants value it as such. For the undocumented it means freedom and the settling of a situation of unlawful presence and a daily ordeal.

The fact that migrants possess these expectations does not necessarily mean that they must be legally protected by the host state.

According to a general principle of protection of legitimate expectations, "*Governments and international organizations may undertake changes of policy in their continuing need to search for the best choices in the discharge of their functions. However, to the extent that policies in force earlier might have created legitimate expectations both of a procedural and substantive nature, for citizens, investors, traders or other persons, these may not be abandoned if the*

*result will be so unfair as to amount to an abuse of power*"[475].

The principle has been affirmed in several European member states, mostly in administrative law, and was specifically and intensely incorporated in EU law[476].

As Forsyth asserts when referring to the principle within UK administrative law, it was first introduced as a procedural principle – mainly linked to the due process but soon gained a substantial dimension, "*in addition to procedural protection legitimate expectations are, or ought to be, substantively protected, i.e. that in order to protect a legitimate expectation a public body would be bound, save in exceptional circumstances, to exercise its discretion in a particular way*"[477].

According to Robert Thomas, "*the principle of legitimate expectations concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority. The principle*

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[475] FRANCISCO ORREGO VICUÑA, Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society (2003), 188.

[476] MICHELE POTESTÀ, *The doctrine of legitimate expectations in investment treaty law* (2012).

[477] CHRISTOPHER FORSYTH, The Provenance and Protection of Legitimate Expectations (1988), 242.

*therefore concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the administrative court is to determine the extent to which the individual's expectation can be accommodated within changing policy objectives*"[478].

In international law, the principle of legitimate expectations is arising linked to a general principle of good faith and the estoppel. The main application of this principle is the area of international investment law[479].

It is also an important principle of EU law. In fact, "*the European Court of Justice has integrated legitimate expectations into its review of legality since the 1970s and recognizes that it "forms part of the Community legal order". The development of the principle was inspired by the German principle of vertrauensschutz, meaning the protection of trust*"[480].

As Sharpston correctly expresses it "*by whichever route the case reaches it, the European Court will then examine the validity of the Community measure at issue with regard, not only to the relevant express Treaty provisions and the interpretation already given to these in existing case law, but also in the light of certain*

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[478] ROBERT THOMAS, *Legitimate Expectations and Proportionality in Administrative Law* (2000), 41.

[479] MICHELE POTESTÀ, The doctrine of legitimate expectations in investment treaty law (2012); CHRIS YOST, A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard (2009); ELIZABETH SNODGRASS, Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle (2006); MARION PANIZZON, Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement (2006).

[480] ROBERT THOMAS, *Legitimate Expectations and Proportionality in Administrative Law* (2000), 42.

*"fundamental principles" that it has itself developed, drawing on the legal traditions of the different Member States. Occasionally, the European Court will hold that Community legislation or decisions are invalid because one of these fundamental principles such as legitimate expectation, proportionality, and the principle of non-discrimination have been violated. The doctrine of legitimate expectations is "undeniably part of Community law". The question is then, how and in what circumstances is it used? What behavior will create a legitimate expectation on which the economic agent can rely? On the one hand, economic activity takes place against a background of uncertainty-should one regard all changes in the regulatory framework as just one further hazard? On the other hand, economic agents have to be able to place some reliance on something if continuing economic relationships are to be sustained. Certainly, insurance can often be used to pass on the loss should it occur to someone else; but over-insurance represents a misallocation of resources. For both legal reasons (an estoppel-type argument) and economic reasons (sometimes the economic agent should be able to rely on the administration not changing the rules in the middle of the game), a doctrine of legitimate expectations is attractive*"[481].

Or, in the words of Robert Thomas, "*while the principle of legitimate expectations has a potentially wide scope of application, the European Court has, in practice, imposed a high standard on applicants. A successful claimant must point to some conduct by the administration from which it was reasonable to hold certain expectations. Once induced, expectations may be subject to change. The European Court has*

[481] ELEANOR SHARPSTON, European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom? (1990-1991), 87.

*consistently maintained that it will protect expectations only where the change was not reasonably foreseeable. Even if the claimant has a reasonable expectation, the administration may argue that it is overridden by the public interest. This requires the court to determine how far an expectation is worthy of protection in the face of a change of policy. Relatively few arguments based on legitimate expectations have succeeded. A claim will prevail only if there is a clear case of unreasonable treatment and the administration grossly misjudged the protection of the individual's expectations*"[482].

The principle of protection of legitimate expectations is thus protected under international and EU law as well as under the domestic law of many liberal democracies. It is derived from a general principle of trust and *bona fide* in the behavior of public entities.

It is clear that the principle can no longer be seen as merely applicable within a domestic administration or with a limited procedural scope. The principle is broader and affects the activity of the legislator, administration and the State as a whole.

Its application to human rights and, particularly, to immigration and citizenship law is also clear. Notwithstanding, as I have stressed above, its major application in international investment law, there are also clear examples of its relevance in the area of human rights, immigration and citizenship.

We can find several examples in Hong-Kong immigration law. As Paul Reynolds describes it, "*this distinctiveness of legitimate expectations can be seen in the classic case of Ng Yuen Shiu. Here, the applicant's*

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[482] ROBERT THOMAS, *Legitimate Expectations and Proportionality in Administrative Law* (2000), 46.

*status as an illegal immigrant meant that he had no free-standing legal right to challenge the refusal of the Hong Kong authorities to grant him a hearing; only because of a prior Government assurance that illegal immigrants would have such a hearing was the Court able to intervene, thereby protecting his legitimate expectation*"[483]. Other examples can be found in the cases *Ng Siu Tung*, in the *Ng Ka Ling*, *Chan Kam Nga* and in the *Attorney-General of Hong Kong v. Ng Yuen Shui* case[484].

The conclusion of the Hong-Kong Court in these cases was that "*the doctrine [of substantive legitimate expectations] forms part of the administrative law of Hong Kong. As such, the doctrine is an important element in the exercise of the court's inherent supervisory jurisdiction to ensure, first, that statutory powers are exercised lawfully and are not abused and, secondly, that they are exercised so as to result in administrative fairness in relation to both procedural and substantive benefits*"[485].

The leading case on the doctrine of legitimate expectations in the ECJ decisions is the Mulder case. In the Mulder case the Court decided that a milk producer that stopped producing milk for a number of years should not be negatively affected by a milk surplus protection act approved after his decision to cease milk production. When he wanted to resume milk production

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[483] PAUL REYNOLDS, Legitimate Expectations and the Protection of Trust in Public Officials (2011), 330.

[484] CHRISTOPHER FORSYTH and REBECCA WILLIAMS, Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong (2002).

[485] CHRISTOPHER FORSYTH and REBECCA WILLIAMS, Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong (2002).

he would be affected by the measure. The Court said that it was contrary to a principle of protection of legitimate expectations[486].

It was referred to as an application of the principle of good faith in international law by the Court of first instance in the decision Greece vs. Commission[487]. In that decision the court said that "*the principle of good faith is a rule of customary international law, the existence of which has been recognised by the Permanent Court of International Justice established by the League of Nations (see the judgment of 25 May 1926, German interests in Polish Upper Silesia, CPJI, Series A, No 7, pp. 30 and 39), and subsequently by the International Court of Justice and which, consequently, is binding in this case on the Community and on the other participating partners. That principle has been codified by Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties (...). It should also be noted that the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order (Case T-115/94 Opel Austria v Council [1997] ECR II-39, paragraph 93)*" [488].

The principle is present in numerous ECJ decisions and opinions of AGs.

Recently it was mentioned in the opinion of AG Poiares Maduro in the Rottman case.

In paragraph 31 of his opinion on the Rottman case, AG Maduro said that "*as regards the withdrawal of*

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[486] ROBERT THOMAS, *Legitimate Expectations and Proportionality in Administrative Law* (2000), 43.

[487] PIET EECKHOUT, *EU External Relations Law* (2011), 392.

[488] Case T-231/04, paras. 85-87

*naturalisation at issue in this case, some might invoke against it the principle of the protection of legitimate expectations as to maintenance of the status of citizen of the Union. However, it is not clear in what respect that principle has been contravened, in the absence of any expectation meriting protection on the part of the person concerned who has provided false information or committed fraud and has thus obtained German nationality illegally. More especially because, as we have seen, international law authorises the loss of nationality in cases of fraud, and Union citizenship is linked to possession of the nationality of a Member State*"[489].

The extent of this assertion is unclear. According to Gerard René De Groot and Anja Seling, "*the principle of the protection of legitimate expectations, which Advocate General Maduro also potentially views as being capable of restricting the legislative power of the member states in the sphere of nationality (paragraph 31), cannot be disregarded by the national authorities either. Until now, e.g., the courts in The Netherlands repeatedly ruled that the protection of legitimate expectations is not a ground for acquisition of Dutch nationality. It is likely that this view can no longer be maintained in the light of the principle of legal certainty. We expect that consequently all member states have to introduce a construction which protects the possession of the nationality in good faith or, to put it differently, the protection of legitimate expectations*"[490].

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[489] OPINION OF ADVOCATE GENERAL POIARES MADURO, Case C-135/08

[490] GERARD RENÉ DE GROOT and ANJA SELING, Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note 2 - The Consequences of the Rottmann Judgment on Member State Autonomy – The

This means that, according to these authors, the national rules on acquisition and maintenance of citizenship ought to be revised in the light of the principle of protection of legitimate expectations.

In fact, when considering this principle in his opinion, AG Maduro is not saying that the protection of legitimate expectations should not be regarded in a case of citizenship. On the contrary, by considering it, the AG is expressly bringing the principle into the realm of a discussion on citizenship; and he discards it not because it is inapplicable but due to the fraud present in the case. In other words, AG Maduro said that Rottman might have expectations about retaining his German citizenship but the expectations were not legitimate since he had acted in a fraudulent way during the citizenship application procedure.

This may have an unprecedented effect on national laws of citizenship. As Nathan Cambien correctly affirms, "*it can no longer be doubted that the nationality rules of the Member States have to be in accordance with a number of fundamental principles of Union law. This requirement evidently has consequences for the immigration laws and policies of the Member States, since the criteria for granting nationality to third country nationals now appear to fall within the scope of Union law. The precise scope of the requirement is at present, however, far from clear. Do the principle of proportionality and the principle of legitimate expectations require, for instance, that a Member State grant its nationality to third country national's longtime resident on its territory? And does the Commission have the power to bring an infringement action against a Member State whose*

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European Court of Justice's Avant-Gardism in Nationality Matters (2011), 158-159.

*criteria for the acquisition of nationality appear contrary to certain fundamental rights? An oft-discussed case in this connection is the nationality legislation of Estonia and Latvia, which makes it very hard for Russian-speaking minorities to acquire the nationalities of these countries. The Commission has in the past expressed its concern over this situation, but it has never taken concrete action. The Union institutions have so far adopted a low profile in nationality matters, given the traditional view that Union law had no say in these matters. The increasing importance of Union citizenship and the bold case law of the ECJ just discussed may lead to a more proactive approach on their part in the near future*"[491].

In fact, the application of the principle to immigrants is not clear. As I stated at the beginning of this chapter, there are a number of expectations that every migrant has the moment she crosses the border of a state.

However, in order to be able to benefit from the protection of the principle, those expectations must be legitimate. What does legitimate mean in this context?

It may mean not fraudulent, as AG Maduro concluded in his opinion to discard the principle in the Rottman case. Yet it does not necessarily mean lawful or in strict coincidence with a given law.

A narrow reading of the principle would point to a protection of citizens against contradictory actions of the administration, primarily at a procedural level.

However, as I have described above, the reading of the principle must be broader, not only in substance but

[491] NATHAN CAMBIEN, Union Citizenship and Immigration: Rethinking the Classics? (2012), 10-37.

also corresponding to a general *bona fide* principle in international law.

Firstly, this is in terms of subjects: it does not only apply to citizens but to all human beings.

Then we may see it in terms of substance: it cannot be limited and isolated to a given law or precise moment; it entails the expectations of a person formed with regard to the State through a number of reiterated acts over some period of time.

Such a situation is adequate to form legitimate expectation. As Habermas properly asserts, "*there is a major gap in the proposed architecture, which primarily concerns the legitimate expectations and demands of citizens in their contrasting roles as cosmopolitan and national citizens. Cosmopolitan citizens take their orientation from universalistic standards which the peace and human rights policies of the United Nations must satisfy no less than a global domestic politics negotiated among the global players. National citizens, by contrast, measure the conduct of their governments and chief negotiators in these international arenas in the first instance not by global standards of justice but above all by the effective observance of national or regional interests. But if this conflict were fought out in the heads of the same citizens, the notions of legitimacy that evolved within the cosmopolitan framework of the international community would inevitably clash with the legitimate expectations and demands derived from the frame of reference of the respective nation-states*"[492].

A question that might arise despite a broader reading of the principle is whether we should consider as legitimate the expectations of a migrant that knows

[492] JÜRGEN HABERMAS, The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society (2008), 447.

or should know that, according to the law of the host country, he or she will never be able to access the citizenship of that state.

Again the narrower reading of the principle would not allow this interpretation, although it might permit the protection of migrants in cases where the law ,or the administrative policies or procedures, changed after the migrant´s arrival.

So, even in a narrower reading, a State should not be able to change citizenship law or practice in order to make it harder to obtain the status and apply it to migrants already on the path to citizenship.

However, in my view, the principle must cover a wider range of situations.

It is not enough to say that the migrant must play the game with the known rules. If it is just a matter of rules, the principle of legitimate expectations would have little or no effect since everything would be reduced to a question of legality and succession of laws.

Expectations are also raised by the conduct of the State and its officials, in an interactive game of give and take. There are different levels of expectations and their legal protection varies according to that level.

The level of expectations – and thus of legal protection – of a recent migrant when compared to someone that has lived in a country for a number of years is not the same.

The expectations of the resident migrant are greater not only because ties have been developed, families raised and professional relationships created, but also because during that path inevitable interactions with public officials were maintained, taxes were paid and there was an actual contribution to society at large.

It means that expectations are not merely unilateral; they were raised by the action of the State

and thus they are legitimate and deserve legal protection.

The whole development of international law, as well as EU law, supports such an interpretation.

The application of this principle to undocumented migrants might also sound problematic. Even if we accept that expectations of documented migrants deserve protection, one may have trouble acknowledging application of the principle to the undocumented[493].

How can the principle protect people that unlawfully entered a given territory?

I believe that the protection of legitimate expectations is even more evident in the case of the undocumented.

In a liberal society where legal mechanisms for naturalization are clear and adequate, the protection of legitimate expectations might not be at stake. A migrant knows exactly what the path to citizenship is and must proceed accordingly, given that the path has been designed in an adequate fashion. This is not necessarily the case in all societies – and that is reason enough to consider the principle as a general rule – but it is hopefully the case of liberal, democratic and constitutional democracies.

Most probably those who will be permanently excluded from citizenship in these societies are the undocumented migrants.

Of course one may say that their expectations are never legitimate for they were founded on an unlawful and fraudulent action.

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[493] RUTH RUBIO-MARIN, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United State* (2000), 36-37.

I would agree with this assertion if the expectations were invoked by a recent undocumented migrant. However, again, expectations over a period of time are not unilateral; they are raised by the State and its officials. What I have said about documented migrants and their integration in the fabric of society and the raising of families can also be said about the undocumented. They are in the exact same social situation.

Yet their expectations receive no protection from the law, whatsoever. That is why it is so important to assess them on a case-by-case basis. It might well be the case that an undocumented migrant had expectations raised based on the conduct of public officials and, down the road, after significantly contributing to the building of a country and raising a family there, the migrant is deported as if he had never set foot in the country.

Even from an equality standpoint, a resident undocumented migrant that possess a large number of expectations and ties to the country cannot be treated in the same way as a newly arrived migrant that is just trying to deceive the border control.

A usual argument against this perspective is that it constitutes a reward for the illegality. However, as Stephen Legomsky convincingly argues, "*at least some undocumented immigrants have acquired a moral "right" to legalization. As residents of the community, their interests in remaining here increase with the passage of time. Their roots grow deeper, and their ties to local, state, and national communities become correspondingly more extensive. It might well be that at some point those interests so outweigh society's*

*interests in deporting them as to ripen into a moral right to remain*" [494].

I believe that the evolution of the principle of protection of legitimate expectations linked to immigration and citizenship law helps to develop a general trend towards the protection of migrants´ expectations in acquiring the citizenship of the State of residence, regardless of their status in that State, given those expectations were not unilateral but were raised by the State, the legislator and public officials over a period of time.

[494] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 31.

## §2. Proportionality

As the literature on the principle of protection of legitimate expectations abundantly shows, it is intertwined with the principle of proportionality.

In fact, legal certainty, good faith, expectations and proportionality are all interconnected in the sense that an act of authority from the State cannot be absolute, free of limits, in terms of its effects on the human beings subject to its jurisdiction.

It is not a matter of justice, rather of legal certainty and expectations. A human being cannot be subject to arbitrary treatment from the authority of the state. This is enshrined not only in most of the constitutions of liberal democracies but also as a general principle of international law[495]. It is also a principle of EU law[496].

At the EU level the principle was specifically invoked by the ECJ in the Rottman case, although it was not mentioned by AG Maduro in his opinion.

The way for the Court to mention the proportionality principle was paved by the opinion of AG Maduro when referring to the principle of legitimate expectations. The Court did not follow this

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[495] THOMAS M. FRANCK, On Proportionality of Countermeasures in International Law (2008), 715.

[496] GRÁINNE DE BÚRCA, The Principle of Proportionality and its Application in EC Law (1993), 105–150; TOR-INGE HARBO, The Function of the Proportionality Principle in EU Law (2010), 158–185; MATTIAS KUMM, Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement (2007); TAKIS TRIDIMAS, *The General Principles of EU Law* (2006); PAUL CRAIG and GRÁINNE DE BÚRCA, *EU Law* (2003), 371-380.

principle that was, in any event, discarded by the AG because of the fraudulent nature of the action under scrutiny, but added to the final decision that member states must take EU law into consideration when establishing national citizenship law, including its principle of proportionality. As I stated in chapter 4, it was the first time that the Court named a specific principle of EU citizenship law.

As Cambien recalls, "*the only principle of Union law that has been explicitly treated by the Court as such a limitation thus far is the principle of proportionality. In Rottmann, the ECJ confirmed that where the withdrawal of Member State nationality entails the loss of Union citizenship, it would only be valid under Union law if it respects the principle of proportionality. The principle of proportionality is a general principle of Union law, which also figures in the Charter of Fundamental Rights of the European Union. One of the essential functions of the principle is to safeguard the individual against national measures that impose excessive burdens. The principle of proportionality requires that the contested national measure be suitable both to achieve the aim pursued ("test of suitability") and to determine whether the means-ends fit is well calibrated ("test of necessity"). The aim pursued must, moreover, be a legitimate one. A third test often described in the literature on proportionality and sometimes found in the case law is the test of "proportionality sensu stricto," where a measure will be disproportionate if it has excessive effects on the applicant's interests*"[497].

It is important to assess what that means in terms of implications for the member states' citizenship laws,

[497] NATHAN CAMBIEN, Case c-135/08, Janko Rottmann v. Freistaat Bayern (2010-2011), 375.

as well as for the international law of citizenship as a whole.

According to Gareth Davies, "*the centrality of proportionality and the conventionality of citizenship concepts in the Member States does mean that dramatic effects of EU law are not obviously likely. This is particularly so given that it will usually be national judges who must apply the proportionality principle to the national measures – they are unlikely to wield an anarchic knife. However, one should be cautious before dismissing EU law as harmless. Union citizenship is an example of a concept which was widely seen as bringing no substantive content in its early years, but has gradually developed into a peg upon which the Court has been able to hang important judgments, impacting on many areas of national law and policy, from access to benefits to the law on surnames. There may well be more aspects of national citizenship law vulnerable to EU law than a first glance suggests. It will be not so much the wider principles which will be potentially conflicting, but their use and application in particular circumstances. For example, in the Netherlands, there has been considerable discussion concerning the withdrawal of Dutch nationality from first or second generation Dutch citizens who commit serious or multiple crimes. Some of the proposal envisaged could result in the stripping of Union citizenship from those who were born Union citizens, and who commit crimes which might not even be serious enough to justify their deportation under the citizenship directive*"[498].

The effects of the application of such a principle are incommensurate. Also assessing the implications of

[498] GARETH T. DAVIES, The entirely conventional supremacy of Union citizenship and rights (2011).

the principle on Dutch citizenship law, Gerard René De Groot and Anja Seling say that "*in particular, problems could arise with regard to Articles 14 and 15 (1) (d) of the Netherlands Citizenship Act which regulates the loss of Dutch Nationality by deprivation. Generally, the principle of proportionality also applies in Dutch national law. However, in addition, following Rottmann, citizens need to have the chance before their newly acquired Member State nationality may be revoked to reacquire their old nationality. Moreover, in the light of the Rottmann ruling, it is questionable whether the Court will accept that deprivation becomes effective immediately, before a decision of revocation becomes unchallengeable. According to Dutch law, after revocation of Dutch nationality by the Dutch Minister of Justice the person immediately loses his Dutch passport even if the person concerned challenges this decision. It can be questioned whether this is in accordance with EU law and in particular with the principle of proportionality. In addition, with regard to Article 15 (1) (d) of the Netherlands Citizenship Act, it is doubtful whether deprivation of Dutch nationality because of failing to have made 'every effort to divest himself of his or her original nationality' can be accepted if a person concerned after having lost Dutch nationality can again be naturalised without making 'every effort to divest himself of his or her original nationality'. It can be assumed that the Court will not accept such a situation as being compatible with the principle of proportionality. In particular, decisions relating to deprivation of nationality, where the person concerned promised to renounce his or her old nationality, but then subsequently discovers that this act actually costs a lot of money, seem to stand very uneasily with the principle of proportionality. In fact, the Council of State found it impossible to prevent the deprivation by using the argument of the high costs*

*encountered. However, after the loss of Dutch nationality, the person involved could apply again for naturalisation and ask for a waiver of the requirement of renunciation due to the high costs involved*"[499].

The situations described are all related to the withdrawal of citizenship. However, as I stated in chapter 4, I believe that the doctrine present in Rottman can be used in the case of granting citizenship.

In fact, proportionality is a common principle in criminal law. Despite criticism from many authors, sanctions relating to immigration law violations have become criminalized[500].

Thus deportation now falls under the strict scrutiny of the proportionality principle[501].

According to Angela Banks, "*the right to remain for noncitizens is based on two principles – connection and proportionality. The jus nexi principle provides a basis for identifying members of the polity. Members have a heightened liberty interest in remaining in the United States. Deportation for minor criminal activity is an illegitimate deprivation of the liberty interest to remain in the United States because it is disproportionate. The first comprehensive crime-based deportation regime in the United States was rooted in both the jus nexi principle and proportionality. Reliance on these foundational norms has diminished and must be restored to achieve a more just deportation*

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[499] GERARD RENÉ DE GROOT and ANJA SELING, *The consequences of the Rottmann judgment on Member State autonomy – The Court's avant-gardism in nationality* (2011).

[500] Vd. Supra chapter 4; STEPHEN H. LEGOMSKY, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms (2007), 471; ANGELA BANKS, Proportional Deportation (2009), 1651.

[501] ANGELA BANKS, Proportional Deportation (2009), 1651.

*regime. In order to realize this goal the right to remain cannot depend on citizenship status*"[502].

I will come back to *ius nexi* later but it is clear and understandable that deportation, especially if considered a criminal sanction, ought to be under the strict scrutiny of the proportionality principle. This means that every deportation decision must pass the proportionality test and prove to be necessary and the benefits must outweigh the costs.

This strict scrutiny is especially important and relevant in cases – regardless of the migrant status – where long term residence has occurred and families are involved.

Here we cannot claim that the principle of proportionality demands a lawful act; it is precisely applicable in the area of criminal law where the actions are unlawful by nature. Penalties must be proportionate to the crime and the individual situation.

I am not praising the criminalization of the immigration law. Quite to the contrary, I have discussed this in chapter 5 and argued otherwise. Yet one cannot forget the very nature of deportation and the special importance of the proportionality principle in its application.

This is to reach a conclusion that the principle is also applicable to undocumented migrants. As Legomsky rightly points out, when referring to proportionality and the rule of law in the context of undocumented migrants and deportation, "*I view proportionality as one essential element of the rule of law. Moreover, when a law is violated on such a large scale, it's not as if the only response consistent with*

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[502] ANGELA BANKS, The normative and historical cases for proportional deportation (forthcoming 2013).

*fidelity to the rule of law is to step up enforcement. An alternate response is to ask whether the absence of respect for that law is evidence that the law insufficiently accommodates the relevant interests. When that is the case, changing an unrealistic law might be preferable to heavier enforcement*"[503].

Thus, connecting proportionality to deportation and to the withdrawal of citizenship we can identify another trend towards the right to citizenship.

Proportionality here must of course be linked to expectations. I am not advocating a prohibition on deportation that would mean an open borders theory. On the contrary, deportation might be a proportionate action when immigration law has been breached and few or no ties have been developed with the country.

On the other hand, when those ties are significant in terms of belonging, deportation is the last resort and can easily be considered disproportionate. That is why widespread legalization programs have been implemented in some European countries[504].

What does it mean if we consider it disproportionate to deport a person? What does legalization entail? What are the consequences in terms of citizenship?

These questions are hard to answer. Probably an immediate answer would be that it is acceptable not to deport an undocumented migrant that shows significant ties with the country but legalization is not admissible or the granting of citizenship.

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[503] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 9.

[504] MARK R. ROSEMBLUM, *Immigrant legalization in the United States and European Union: policy goals and program design* (2010).

That answer might be a political one but it is not morally or legally admissible.

A person that cannot be deported must have a legal status in relation to the country where he is living in. Law cannot create pariahs or *de facto* stateless persons[505].

It is clear then that even undocumented migrants must have a track to citizenship, even if it means going to the back of the line on the path to citizenship. I will come back to this later.

So a decision not to deport based on proportionality – which is absolutely necessary from a legal standpoint – must be followed by an integration of the migrant in some status. Only a legalization – or regularization, as designated in some European countries[506] – can correctly provide a solution for this problem.

At this point, just for the sake of clarity and argument, I must conclude that whenever an undocumented migrant is in a situation of having created strong ties with a country by the passage of time it is disproportionate to deport her.

Following that decision, a legalization process must be in place or otherwise we are transforming the migrant into a pariah.

But would it be proportionate to deny the migrant access to citizenship?

As I have stressed above, proportionality irremediably entered the immigration and citizenship discourse. Again, it would not be proportionate to have a decision that excludes someone from citizenship

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[505] OWEN M. FISS, The Immigrant as Pariah (1999), 6.

[506] MARK R. ROSEMBLUM, *Immigrant legalization in the United States and European Union: policy goals and program design* (2010).

permanently. It is too harsh a measure to condemn someone who is entitled by law to live in a country to permanent alienage and prohibit access to citizenship.

That is why a naturalization process is available in any liberal democracy. Even from an equality standpoint, how can we differentiate documented migrants that will have a path to citizenship from legalized ones that were once undocumented but became legalized after an official decision not to deport them due to the proportionality principle?

I am not claiming that the proportionality principle must play a decisive role here. In this chapter, using the ammunition collected in the previous ones, I am identifying a trend that results from a set of facts and arguments in the direction of a right to a specific citizenship.

However, it is certainly undeniable that proportionality plays a role in immigration and citizenship law and that this principle is breached if we decide to deport, deny rights or permanently exclude a migrant from citizenship.

Other arguments may help this one and I will discuss them later in this chapter.

## §3. Ius domicilii

The literature on citizenship usually discusses *ius soli* and *ius sanguinis* as the criteria for the attribution of citizenship[507].

I do not intend to challenge this view that is so deeply rooted in worldwide practice to the point that it can even be considered international customary law[508].

However, these criteria are solely connected to the original attribution of citizenship; they do not operate in the so-called derivative attribution or naturalization. Most probably the reason for the difference is that naturalization is perceived as an absolute sovereign domain of the states, even more than the granting of original citizenship.

It is so much so that naturalization is usually described as an act of will by the state that can be rendered because of different reasons such as relevant or heroic services to the state[509].

Although the granting of citizenship of origin is not an irrelevant subject to migrants, especially for the second and third generations, the most sensitive issue is naturalization.

For the sake of my argument, naturalization is key in the sense that the right to citizenship due to residence in a country is usually a question of naturalization.

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[507] PAUL WEISS, *Nationality and Statelessness in international law* (1979), 96.

[508] Rejecting the theory but referring to dissenting opinions see PAUL WEISS, *Nationality and Statelessness in international law* (1979), 96.

[509] Such a provision exists, among others, in the Brazilian and the Portuguese citizenship legislation.

Probably because of the intense migration movements that have recently occurred and the pressure they put on citizenship, authors have now discussed much more the criteria that are applicable to naturalization rather than to citizenship of origin.

Ayelet Shachar paid attention to naturalization. According to her, "*this postnatal path to membership, at the end of which stands the ultimate prize of citizenship in the country of immigration, is long and arduous. (...) To become eligible for naturalization, a person must first be legally admitted as a long-term resident; before that, he or she must have gained a valid entry visa to the country. In a world of regulated borders, this is not easy, especially when the individual is seeking entry to one of the world's more prosperous nations. Each year, only a minuscule percentage of the global population is granted a coveted immigrant visa and is permitted to enter through the "golden door" and into one the world's richest countries (...). The classic path of naturalization thus represents the culmination of a process of graduated transformation, in which formal citizenship is the ultimate prize*"[510].

The arguments that I have been using all point to non-arbitrary legislation on naturalization. This means that unlike the traditional theory on the absolute sovereignty of states over citizenship and naturalization, I have shown that there are growing limits being imposed on the States, especially to control and limit discrimination and arbitrary decisions.

Also, as Shachar expresses and as I have been highlighting, a great deal of the right to citizenship, as a right that forms itself though a path, results from

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[510] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 128-130.

interactions with the State, expectations, and time elapsed.

So if we were to determine a criterion that is adequate to define the attribution of citizenship by naturalization, *ius domicilii* might be it.

*Ius domicilii* is already a criterion incorporated in most national citizenship laws. In fact, naturalization is usually acquired after a period of permanent residence in the host country.

So what difference would it make to elect a new *ius domicilii* principle?

*Ius domicilii* is usually determined in national citizenship laws in different designs according to the internal will and sovereignty. It is basically a matter of choice of the host country.

According to my view, there is a trend that makes it mandatory for States, based on moral and legal arguments, to provide for naturalization of migrants – documented or undocumented – after a certain period of residence.

Ruth Rubio-Marin proposed an automatic naturalization of resident aliens. According to her, "*the need to go one step further and proclaim automatic access is not irrelevant. It rests on a important conceptual difference. More than a right to naturalize (or regularize), what is claimed is the right to be recognized as a legitimate holder of all the rights granted to citizens (...) underlying this notion of an autonomous claim to membership is the idea that permanent resident aliens have to be seen as belonging to the constituent community already*"[511].

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[511] RUTH RUBIO-MARIN, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (2000), 103. Also on automatic imposition of citizenship see RUTH DONNER, *The regulation of nationality in international law* (1994), 160. Concurring on the non-

Although she presents a compelling thesis, she then engages in a long discussion on the merits and inconveniences of an automatic attribution of citizenship from the standpoint of the migrant and of the society.

I do not think this is the main point. Just the mere acceptance of citizenship as a right that the migrant holds against the State is revolutionary. It is not necessary to go further and impose it on migrants. Its configuration as a right, especially as a human right in the context of international human rights, provides the adequate background.

As a right it is up to the migrant to exercise it or not. So, after a period of residence, the migrant would be able to exercise the right to citizenship against the State – without the possibility of the State denying it – but the exercise of this right would always be a decision of the migrant.

Residence was also correctly considered by Rainer Bauböck. He affirms that a citizen is an inhabitant of the state in what he calls the principle of residence. A blunt application of this principle would serve to "*turn into a citizen everybody who lives in the territory and to deprive anybody of citizenship who leaves the territory*"[512]. But he recognizes that "*there is neither a natural way of determining a threshold of permanent residence, nor an international authority which could override the sovereignty of independent states and impose such a standard criterion*"[513].

Yaffa Zilbeshats correctly assesses this question by electing residence as the criterion to grant citizenship

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automatic attribution YAFFA ZILBERSHATS, *The human right to citizenship* (2002), 108.

[512] RAINER BAUBÖCK, *Transnational Citizenship* (1994), 31.

[513] RAINER BAUBÖCK, *Transnational Citizenship* (1994), 34.

and configuring it as a human right. Actually she says that "*if residence is the central link required for giving rise to the right to nationality, then when the requirement of residence has been met, the State will be under a duty to grant nationality*"[514].

Zilbershats´ theory is inspired in the writings of Michael Walzer, especially in the Spheres of Justice. In this book, Walzer establishes a parallel between residence and citizenship. He calls for the naturalization of residents saying that the members of the community must be prepared to accept foreigners as equals, on a moral basis. He uses several examples and comparisons. One is of a family with live-in servants that he compares to a tyranny. Another image is of the Athenian "metics". In Ancient Greece Athens, as I described in chapter 1, foreigners were permanently excluded from access to citizenship. Not recognizing a fundamental right to citizenship based on residence would be equal to the discrimination against the "metics" in ancient Greece. Another example is the guest workers[515].

Joseph Carens, in a response to Noah Pickus, also affirms, as I quoted in chapter 3 that "*anyone who has resided lawfully in a liberal democratic state for an extended period of time (e.g. five years or more) ought to be entitled to become a citizen if he or she wishes to do so*"[516].

More recently, Ayelet Shachar proposed an interesting theory of substantial and genuine connection

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[514] YAFFA ZILBERSHATS, Reconsidering the Concept of Citizenship (2001), 689; Id., *The human right to citizenship* (2002), 101.

[515] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism end equality* (1983), 52-56.

[516] JOSEPH CARENS, Why naturalization should be easy: a response to Noah Pickus (1998), 142-143.

that she calls *jus nexi*. According to Shachar, "*the idea of adopting a functional, genuine-connection criterion for defining citizenship finds support from an unexpected source: the jurisprudence of international law. In the landmark 1955 Nottebohm decision, the International Court of Justice held that citizenship is not merely an empty "title." It must reflect instead: "a legal bond having as its basis the social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the [s]tate conferring [citizenship] than with any other [s]tate*"[517].

Shachar revisits Nottebohm and the genuine link theory to reach the conclusion that whenever an effective link exists, citizenship must be granted. She says, "*returning to the Nottebohm case, which deals directly with our subject of inquiry, namely, illuminating the meaning to be given to the genuine connection conception of membership, the ICJ articulates several different factors that need to be taken into consideration in identifying whether a real and effective link has been established, granting that the importance (or weight) of these factors might vary from one case to the next. This list of factors (which is illustrative rather than conclusive), includes, in the court's words, "the habitual residence of the individual concerned but also the centre of his [or her] interests, his [or her] family ties, his [or her] participation in public life, attachment shown by him [or her] for a given country and inculcated in his [or her] children,*

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[517] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 166.

*etc." This "center of interests" test is pragmatic and functional; it requires evidence of the establishment of a genuine connection between the individual and the political community*"[518].

So to Shachar, domicile is not enough. A genuine link theory must take other factors into consideration, namely those referred to by the court in the Nottebohm decision as showing an attachment between the person and the State.

She gives the name *jus nexi* to this connection criterion.

She adds that "*these connections need not grow out of blood or territory; they may well develop out of experiences of social interaction that takes place under the normative umbrella of a given political community and within a particular geographical location. In this way, jus nexi reflects the idea of democratic inclusion, according to which those who are habitually subject to the coercive powers of the state must gain a hand in shaping its laws, if they so choose. In this respect, jus nexi differs from a pure domicile-based principle of membership that would provide automatic naturalization (ex lege) for anyone residing in the polity after their presence is deemed permanent, as advanced, for example, by Ruth Rubio-Marin in Immigration as a Democratic Challenge*"[519].

She argues that in her theory what is necessary is "*not mere physical presence in the territory but also the passage of time and social connectedness, the latter referring to the requisite "center of life" criteria,*

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[518] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 168.

[519] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 178-179.

*which itself can be interpreted in more generous or more stringent ways*"[520].

I have a sympathetic view on the *jus nexi* theory because it not only revisits Nottebohm in a correct way – as I have interpreted it in chapter 2 –, anchoring the argument in the international law on citizenship and its current interpretation, but also provides for solid arguments in the direction of a fundamental right to citizenship.

According to Shachar, *jus nexi* differentiates itself from *ius domicilii* as described by Ruth Rubio-Marin in two ways: i) it demands more than mere domicile, it refers to the requisite "center of life" and ii) it relies on the choice of the migrant and does not impose citizenship against his will.

As to the first argument, some caution is recommended. Because of the broad nature of the concepts involved, it will give the States significant discretion in defining the procedure to grant citizenship.

Who defines center of life? Or social connectedness?

States will create all sorts of procedures to utilize these concepts as barriers to citizenship and to regain sovereignty over it.

The clear advantage of a purely domicile theory is that it is objective. There is no dispute – other than factual by way of evidence – over the period that someone has resided in a given country.

States tend to test the degree of integration of the citizenship candidate through an exam on language and

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[520] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 179.

culture. That would probably be the way to confirm the degree of connection in Shachar´s theory.

However, these tests are not consensual. Sometimes they can be manipulated to create substantial barriers to naturalization.

As Carens asserts, "*requirements refer to legally enforceable standards that must be met as a condition of naturalization (such as length of residence, demonstrating a certain level of language proficiency, passing a test on the country's history and institutions, etc.) (...) with respect to requirements, I think the standards should be very low. Indeed, I think that length of residence is the only standard that is ultimately justifiable for permanent residents*"[521].

Even the delays in deciding a naturalization petition can constitute an illegitimate obstacle to naturalization and defer the residence demand beyond a reasonable period[522].

When discussing the naturalization criteria in the US, Gerald Neuman criticizes what he calls obsolete and ideological qualifications and questions proficiency in English as a naturalization criterion[523].

In a dialogue with Neuman´s article, Legomsky responds that "*both the nature and the value of the citizenship bond might depend also on the way in which citizenship is acquired. One who acquires citizenship through naturalization might value the resulting status as a hard-earned reward for the time and effort*

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[521] JOSEPH CARENS, Why naturalization should be easy: a response to Noah Pickus (1998), 142.

[522] On the delays in naturalization procedures, AMBER PERSHON, Processing Citizenship, Jurisdictional Issues in the Unreasonable Delay of Adjudication of Naturalization (2011-2012), 259.

[523] GERALD L. NEUMAN, Justifying U.S. Naturalization Policies (1994-1995), 237.

*invested in studying the English language, American history, and civics*"[524].

In any event, naturalization criteria that Neuman calls "ideological qualifications" are highly controversial and pose serious questions in terms of a substantive right to citizenship.

Peter Spiro identifies a trend towards relaxing naturalization requirements in the U.S. He says that "*naturalization has never been and is still not today merely for the asking. The thresholds do, however, show signs of being relaxed, in both law and practice, at least relative to mid-twentieth-century standards. The residency requirement has been reduced with respect to various applicants, most notably spouses of U.S. citizens. Other statutory measures exempt many applicants from the language and civics requirements, based on age, length of residence, and physical or mental impairment (broadly defined in practice). Those subject to the civics requirement face a test that requires nothing more than memorization. The language requirement has been clarified to require only facility in simple English, and examiners are generous in finding it satisfied. With the end of the cold war, ideological restrictions implicate a tiny number of cases. Even the oath requirement, long standing as an absolute (if in most cases easily satisfied) condition to naturalization, is now waivable where the applicant cannot for mental reasons understand its nature. Perhaps the most serious obstacles to naturalization are the fear of tests that uneducated would-be applicants often harbor, the maze of the immigration bureaucracy, and a fee that represents a hefty bite out of many immigrant wallets*".

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[524] STEPHEN H. LEGOMSKY, Why Citizenship? (1994-1995).

On residence, Spiro adds that "*residency has been a requirement for naturalization since the Founding. Current law mandates a five-year period of residency as a permanent resident alien in most cases, including physical presence for at least half that period with no interruption of longer than a year. The durational residency requirement is the most unbending of all qualifications for naturalization; although there are reductions in the required duration for some categories of applicants, there are no waivers from applicable thresholds based on disability or humanitarian considerations. Residency requirements may be passively satisfied (that is, it takes no special ability to meet them), but naturalization will not be granted before they have been fulfilled. Durational residency requirements present another deployment of the territorial premise. As with the birth citizenship regime—under which most individuals garner citizenship by virtue of where they were born— the naturalization regime makes an assumption about physical presence, namely, that by being present, one will become a member of the national community as a matter of fact and assimilate whatever characteristics make up the national identity*"[525].

Spiro then criticizes the test requirements, giving dramatic examples like that of persons with disabilities as an unacceptable situation where the test might be discriminatory. Fortunately these situations have been considered within the naturalization procedures, where waivers are available[526].

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[525] PETER SPIRO, *Beyond citizenship: American identity after globalization* (2008), 35-37.

[526] PETER SPIRO, *Beyond citizenship: American identity after globalization* (2008), 41.

An assessment of the criteria to fulfill the *jus nexi* requirement proposed by Shachar would necessarily entail some form of test and discretion.

I do not oppose these tests, in principle, just as I do not think they constitute, *per se*, inadmissible barriers to naturalization. However, again, these tests ought to be assessed in the context of a fundamental right to citizenship based essentially on residence.

A strict proportionality assessment is necessary and cannot, in terms of substance, length or delay, constitute an obstacle to naturalization. It is quite evident that if a State is limited in its powers to restrict naturalization – as is becoming consensual – it cannot circumvent those limitations by imposing additional requisites or disproportionate naturalization tests.

I think that Shachar´s theory – although appealing – ought to be confined. Or it will serve the opposite goal to that which is intended. By creating a broad and indefinite concept of connection it will provide States with the grounds for discretionary discrimination.

The second difference in relation to Ruth Rubio-Marin´s *ius domicilii* is that *jus nexi* would not be automatic. Again, although that was the formulation that Ruth Rubio-Marin elected to configure for *ius domicilii*, I do not think it is strictly necessary; there can be a fundamental right to citizenship based on residence that is not automatic but depends on the voluntary exercise of that right by the migrant. In this context I would agree with Shachar, but we need to acknowledge that an *ius domicilii* theory can have a different formulation to Rubio-Marin´s, namely regarding automatic attribution.

The idea of revisiting Nottebohm is also very appealing. As I have asserted in chapter 2, I think that the potential of the genuine link theory has never been totally explored. It should work not only in a negative

way – to enable a State to challenge another State´s attribution of citizenship based on the lack of an effective link – but also in a positive way – granting a migrant a fundamental right to citizenship based on the existence of such a link.

I totally agree with Shachar on that point. In a recent article, Robert Sloane rejects the historical importance of Nottebohm and the genuine link theory. He says that "*the conception of nationality expressed in Nottebohm's dicta certainly describes one plausible vision of nationality, and it continues to have salience in some areas of international law. But the genuine link theory is neither the only nor, necessarily, the most appropriate, regulatory tool. No single doctrine will be effective and well-suited to the international regulation of nationality in every circumstance. Rather, international law would be better served by atomizing the concept by its distinct functions and regulating (or not regulating) nationality at the international level commensurately*"[527].

Although I do not follow Sloane in his narrow reading of the Nottebohm decision and its impact on later developments in international citizenship law, it is worth noting his warning against a monolithic reading of the citizenship concept.

In fact I do not wish to find one criterion that serves as the master key to open the door of the right to citizenship. My proposition is of a more modest nature.

While acknowledging a general trend towards the recognition of this right that is anchored both in general principles of international law and in democratic and moral arguments, I wish to identify this trend in a complex web of arguments and facts.

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[527] ROBERT D. SLOANE, Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality (2009), 59.

In that sense I do not think that *ius domicilii* or *ius nexi* alone can solve all the problems and grant citizenship.

However, I certainly advocate that residence is a very important connecting factor for all the reasons described. Moreover, it has an additional advantage: it is objective, easily identifiable and provable.

In any event, it is clear from the literature cited that a trend is forming in the direction of a general right to a citizenship of a State based on residence and other attachments with that State over a period of time.

## §4. Adverse possession

It has become clear that the passage of time is essential in the definition and acquisition of a fundamental right to citizenship.

Time and residence seem to be the cornerstone criteria for a right to naturalization.

I have just discussed the issues and difficulties around residence.

Time is a no less controversial question. Should time be relevant to acquire citizenship? On what grounds? How much time should be enough to acquire citizenship?

These questions are certainly relevant and must be answered before trying to establish a solid time passage theory on the acquisition of citizenship.

An interesting analogy that has been established, as referred to by Stephen Legomsky, is comparing the legalization right to adverse possession in property[528].

Monica Gomez established the analogy with regard to the situation of undocumented migrants. According to her, "*the doctrine of adverse possession of property offers equitable principles that logically support the plight of the illegal immigrant, as well as basic elements that easily apply to the way in which illegal immigrants come to "possess" an America identity, if only in abstract terms. If, for the sake of administrative convenience, due process in deportation cannot be the norm, then immigration by adverse possession will, at the very least, provide equitable protections to*

[528] STEPHEN H. LEGOMSKY, Portraits of the Undocumented Immigrant: A dialogue (2009), 31.

*deserving illegal immigrants as the federal government undertakes to uproot the very trees it planted*"[529].

Timothy Lukes and Minh Hoang also dedicated their attention to the parallel between adverse possession and immigration. They affirm that "*a legitimate claim, then, for patriation of undocumented workers based on the legal prerequisites of adverse possession, is compelling. Undocumented immigrants clearly occupy the United States, especially given the sense in which occupation is related to physical connection and interaction with the land*"[530].

Both articles give a great deal of consideration to the fulfillment of the property law adverse possession and immigration law. My purpose here is not to try and perfectly fit adverse possession into the realm of immigration but to find within adverse possession its general principles that might be applicable to immigration and citizenship.

More recently, Ayelet Shachar suggested applying the adverse possession theory to immigration and citizenship in the context of her *jus nexi* proposal. She argues that "*adverse possession thus offers a "startling means of acquiring property." "Startling" because it holds that a trespasser – that is, a person who entered without permission – may obtain full title to the property into which he or she initially entered unlawfully, if the occupancy (or in our case, residency) is peaceful, continuous, and visible "for all the world to see if the owner cared to look." To acquire title in this way, however, certain conditions must apply. The*

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[529] MONICA GOMEZ, Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States (2007-2008), 105.

[530] TIMOTHY LUKES and MINH HOANG, Open and Notorious: Adverse Possession and Immigration Reform (2008), 129.

*most significant of them is that the entrant must have resided in the territory in actual possession for an extended period of time*"[531].

When comparing adverse possession to citizenship, Shachar says that "*if the authorities have chosen to turn a blind eye to the "adverse possession" by millions of unauthorized migrants who settled within their territory (after crossing the border without permission or overstaying their visas), then there must be a point in time when they are estopped by their own inaction; in other words, the unauthorized entrants ought to gain immunity from deportation and removal, in addition to being offered an eventual route for legalizing their status*". And she concludes that "*what counts are "the ties that non-citizens develop over time." This fits flawlessly with the logic of jus nexi and the doctrine of adverse possession, and in a similar fashion, provides a remedy only after expectations to stay have been established, a process that in most jurisdictions requires the passage of a significant amount of time*"[532].

A common angle of analysis in all these theories is that adverse possession should be applicable to migration and to the situation of undocumented migrants. The relationship with citizenship is not clear. Shachar mentions "*an eventual route for legalizing their status"*.

Monica Gomez is more categorical when she admits that "*the status of the immigrant adverse possessor should be changed to that of legal permanent resident,*

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[531] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 185.

[532] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 186-187.

*after which he may naturalize according to the same rules that all legal permanent residents must follow*"[533].

So what these authors believe ought to be obtained by adverse possession is a right to legalization and not the right to citizenship. I think the adverse possession is too powerful to end up producing a mere right to legalization (which might be controversial in the US but corresponds to a practice in many European countries[534]). I will come back to this later.

As I have underlined above, I will not try to fit adverse possession in the immigration context. As Lukes and Hoang correctly put it, "*more important than qualification for legal standing, however, is justification of extending the concept of adverse possession to undocumented immigrants. Here it helps to consider adverse possession in terms of widely recognized policy considerations*"[535].

As these authors recognize, adverse possession tends to fall under two distinct concepts: the influence of time and the influence of improvement.

I want to focus on the passage of time. As Joseph Singer eloquently phrases it, "*the adverse possessor – the person who has been occupying the property – has come to "shape his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life*"[536].

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[533] MONICA GOMEZ, Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States (2007-2008), 122.

[534] MARK R. ROSEMBLUM, *Immigrant legalization in the United States and European Union: policy goals and program design* (2010).

[535] TIMOTHY LUKES and MINH HOANG, Open and Notorious: Adverse Possession and Immigration Reform (2008), 131.

[536] JOSEPH SINGER, *Entitlement: The Paradoxes of Property* (2000), 45.

Adverse possession, which dates back to Roman law – *usucapio* –, is anchored in a general principle of legal certainty. The possession of land for a continued period of time and in an open and notorious way shall entitle the possessor to the ownership of the land.

The main objective of this mechanism is to protect expectations of the possessor and the community and promote legal certainty. In that sense it is well connected to the principle that I have discussed above of legitimate expectations.

The passage of time has significant legal implications. Sometimes it is preferable to settle a situation that is *de facto* consolidated than to maintain the uncertainty over its legal definition.

To come back to immigration, a migrant maintains a stable relationship with the land of the country where he or she resides and creates expectations in an open and notorious way.

Of course here a first argument might arise. The status of the migrant is not always evident or even whether he is a migrant. However, that is exactly the beauty of the comparison to adverse possession. The possessor is not the proprietor nor is it evident for others that he is not the proprietor; he must act, openly and notoriously as the proprietor in order to fulfill the requirement.

So the mere concealment of the migrant status – notably of the undocumented status – is not an obstacle to the fulfillment of the prerequisite. Migrants do behave normally in society and act as if they were citizens[537].

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[537] MONICA GOMEZ, Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States (2007-2008), 113-114.

Now I must consider the adverse possession of legalization versus adverse possession of citizenship. I said before that the adverse possession of legalization – as proposed by the literature – is too weak for this powerful tool.

Adverse possession allows for the acquisition of property, one of the most important rights at an internal level. If we transpose it to the international and sovereign level, is it enough to claim a right to legalization? And more important than that: is legalization enough to achieve the objectives of legal certainty that justify adverse possession.

It seems to me that we are demanding major principles to solve an administrative, almost bureaucratic question.

Of course the authors recognize that legalization is a stage on the path to citizenship. Eventually a legalized migrant will acquire citizenship, but not because he has a fundamental right to it. That will eventually happen after not being deported, being legalized via adverse possession and finally having fulfilled the requirements of naturalization that remain, which, for the most part, are discretionary.

Shachar says that adverse possession and *jus nexi* go well together[538]. For that to be the case, adverse possession must relate to citizenship and not to legalization, otherwise *jus nexi* is only providing the State further motives for scrutiny and screening of migrants after a nightmare of procedures and time passing.

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[538] AYELET SHACHAR, *The birthright lottery: citizenship and global inequality* (2009), 187.

The only meaningful way I see of using the adverse possession allegory is if it is directed towards citizenship, regardless of the migrant´s status.

In fact, it should also be applicable to documented migrants. I understand that the situation of the documented in a liberal democracy is not a matter of concern in terms of naturalization. However, it could be in countries without a fair naturalization process.

In theoretical terms it does not make sense to differentiate between documented and undocumented migrants in terms of acquisition of citizenship through adverse possession. The same arguments apply to both (even if the distinction between *bona fide* and *mala fide* might apply here).

The difference would result from the time frame. There ought to be a reasonable period of time after which all human beings residing effectively in a given country are entitled to its citizenship regardless of their status. There is no reason here – considering all the above arguments – to differentiate between the documented and undocumented.

In a liberal democracy, the documented migrants would be entitled to a naturalization procedure that is presumably shorter than the standard time frame for naturalization according to the said general rule. So they would not be in the exact same situation: the documented would have access to citizenship though a faster lane than naturalization, according to the national law; the undocumented would only have access to naturalization after a standard number of years in residence.

In a country without a naturalization procedure or with a discriminatory or disproportionate one, the

standard time frame would be applicable to all – documented and undocumented[539].

And my conclusion, because it is drawn from general principles and from the arguments I set out in previous chapters, especially chapter 2, identifies a trend anchored in international law rather than in national policies.

Thus, it is not necessary for a State to legislate two different procedures. Only one naturalization procedure is necessary. Documented migrants may access it after the period of time specified in the national law; undocumented migrants may access it after the standard international period of time.

The latter, of course, would not be exempt from the other prerequisites in the national law, namely language and culture tests, but as I have argued above, these tests should be of low difficulty and in particular they should not constitute additional substantial obstacles to naturalization. According to this trend, after the said international standard of time, migrants do have a fundamental right to citizenship.

The major question now is: what should that standard period of time be?

When discussing adverse possession, authors look at the time frame for the acquisition of property. Again, no matter how appealing the comparison may be, it makes little sense to look for a substantial argument in terms of residence demand in national or comparative property law.

Immigration and citizenship laws are rich enough to provide us with the material we need to find that time frame.

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[539] Concurring with the conclusion on the basis of residence see YAFFA ZILBERSHATS, *The human right to citizenship* (2002), 103-104.

A number of studies have been conducted on comparative naturalization policies, especially regarding the time frame for naturalization.

One of the most comprehensive research projects, although somewhat outdated now, was conducted by Patrick Weil. This research compares data in 25 different countries in the world from Australia to several European countries, to Israel, Mexico, Russia and the US. It shows that all these countries have a naturalization procedure based on a certain residence length. The residence period ranges from 3 to 10 years. Of the 25 countries included in the research, 4 have a residency demand before naturalization of less than 5 years, 15 have between 5 and 10 years and 6 have ten years or more[540].

Some very important research on naturalization in Europe was conducted by the NATAC project. According to the conclusions of this research project, "*Even where the law itself does not create difficult hurdles, access to nationality may be blocked by administrative practices and implementation procedures. We recommend that applicants for naturalization should not be burdened by high fees and excessive demands for official documents. There should be a maximum period within which applications have to be decided. Civil servants dealing with naturalization should be trained and supervised, negative decisions should always have to be justified in writing and applicants should have the opportunity to complain and the right of appeal. Public administrations ought to provide assistance and cooperate with migrant organizations in helping immigrants prepare their applications and meet language requirements. In*

[540] PATRICK WEIL, Access to Citizenship: A comparison of Twenty-Five Nationality Laws (2001), 22-23.

*countries where the implementation of nationality laws is delegated to regional or local authorities, it is important to ensure uniform standards in applying the law*"[541].

There is an understandable concern to avoid the administrative naturalization procedure being utilized as a way to create additional obstacles, due to bureaucratic barriers or intentional manipulations of the application of the law. Naturalization procedures should be fast and smooth. The idea of a maximum period for these procedures to occur is very appealing.

This study also looks at the length of residence in different European States necessary to acquire citizenship.

According to its conclusions, "*member States require a minimum residence period of between three years (Belgium, for acquisition by naturalization) and ten years (Austria, Greece, Italy, Portugal and Spain). Eight states require five years or less. In most countries, residence must have been legal and the applicant's place of habitual residence must have been in the state concerned. Generally, residence must have been uninterrupted immediately before the application. Short residence requirements are preferable for the sake of security of residence, social inclusion and political integration. Since full protection against expulsion, legal equality and political participation generally still depend on nationality, lower residence requirements reduce the risk of creating a large and relatively stable group of second-class citizens. (...) Five years is long enough to acquire genuine links to and practical knowledge of the country of*

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[541] RAINER BAUBÖCK, EVA ERSBØLL, KEES GROENENDIJK and HARALD WALDRAUCH, The Acquisition of Nationality in EU Member States: Rules, Practices and Quantitative (2006), 13.

*naturalization. (...) Austria grants naturalization by entitlement after fifteen years in the case of proven and sustained integration, or after thirty years without further conditions, which is clearly too long*"[542].

An interesting comparative survey in Europe with detailed conclusions and figures was presented by Marc Morjé Howard in 2009. In terms of naturalization requirements he concludes that "*seven countries (Austria, Denmark, Germany, Greece, Italy, Luxembourg, and Spain ) could be characterized as "historically restrictive" in the 1980s, although some were more so than others. Finland, the Netherlands, Portugal, and Sweden were in the "medium" category, though with different combinations of scores distinguishing the Nordic and non-Nordic countries. Finally, the four-country group of Belgium, France, Ireland, and the United Kingdom constitute the "historically liberal" category*" [543].

Great attention has been given to naturalization in European countries by EUDO CITIZENSHIP, an observatory within the European Union Observatory on Democracy (EUDO) web platform hosted at the Robert Schuman Centre of the European University Institute in Florence. This Observatory issues regular surveys on naturalization policies and practices in the EU. One of the last studies was conducted by Sara Wallace Goodman. She did a survey on Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg,

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[542] RAINER BAUBÖCK, EVA ERSBØLL, KEES GROENENDIJK and HARALD WALDRAUCH, The Acquisition of Nationality in EU Member States: Rules, Practices and Quantitative (2006), 13.

[543] MARC MORJÉ HOWARD, *The Politics of Citizenship in Europe* (2009), 22-29.

Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

The survey includes 33 countries. Of these, 1 has a residency demand of three years, 1 of four years, 11 of five years, 2 of six years, 4 of seven years, 6 of eight years, 1 of nine years, 6 of ten years and 1 of twelve years[544].

In any event, although there are a great deal of changes from survey to survey due to a fast variation in citizenship law, these surveys confirm some general trends.

First, countries tend to have a naturalization procedure based on a residence period.

This period usually ranges from 3 to 10 years, 5 being the most common time frame.

Based on this data, it is possible to firmly conclude that there is a general international trend – as far as it is possible to collect data, and being aware of the lack of data from many countries in the world – towards naturalization based on residence after a period of no more than ten years.

As I have described in chapter 2, there is an additional element of international law. The European Convention on Nationality establishes that each State Party shall provide in its internal law for the possibility of naturalization of persons lawfully and habitually resident in its territory. In establishing the conditions for naturalization, it shall not provide for a period of residence exceeding ten years before the lodging of an application.

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[544] SARA WALLACE GOODMAN, *Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion* (2010), 7.

This is an additional element in the said trend towards a period of around ten years of residency.

As Paul Weiss points out about *ius soli* and *ius sanguinis,* "concordance of municipal law does not yet create customary international law; a universal consensus of opinion of States is equally necessary"[545].

However I am not trying to conclude that there is a customary law of naturalization after a period of 10 years of residence; that conclusion would be short and inaccurate.

It would be short because it would not include undocumented migrants; it would be inaccurate because the psychological element of the customary law would be impossible to prove.

On the contrary, my claim is just to identify an international trend in the direction of naturalization after a certain period of time in residence (around ten years).

This trend finds support in international law not because it was formed on the basis of customary law but because it is anchored in international law fundamental principles described in this chapter that, in some cases, may be considered as *ius cogens* or mandatory international law.

It is not only the case of the principle of protection of expectations or proportionality; it is also certainly the case of the adverse possession analogy that I discussed here, insofar as it represents an application of a general principle of legal certainty.

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[545] PAUL WEISS, *Nationality and Statelessness in international law* (1979), 96.

## §5. The paradox of democratic legitimacy

From a democratic principle standpoint the absence of a right to citizenship is also problematic.

As I described in chapter 5, a universalistic rights approach based on human rights in international law leaves citizens with a limited number of rights.

It is not that these rights, although limited, are not important. I am referring to the right to freely enter and exit the territory of the State and to political rights. As I have shown in the previous chapters, these rights have a powerful inclusion potential and cannot be disregarded. The attempts to disperse citizenship elements and give some to migrants are also not successful enterprises from my perspective, for they miss the institutional and inclusion element that is very important in the citizenship status.

Anyhow, a permanent exclusion of permanent residents from political rights constitutes what can be called "the paradox of democratic legitimacy".

Seyla Benhabib developed this theory in her work. According to Benhabib, "*ideally, democratic rule means that all members of a sovereign body are to be respected as bearers of human rights, and that the consociates of this sovereign freely associate with one another to establish a regime of self-governance under which each is to be considered both author of the laws and subject to them*"[546].

In another passage she explains clearly her theory: "*the democratic people shows itself to be not only the*

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[546] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 43.

*subject but also the author of its laws. (...) Popular sovereignty means that all full members of the demos are entitled to have a voice in the articulation of the laws by which the demos is to govern itself. Democratic rule, then, extends its jurisdiction in the first place to those who can view themselves as the authors of such rule. As I will argue, however, there has never been a perfect overlap between the circle of those who stand under the law's authority and the full members of the demos. Every democratic demos has disenfranchised some, while recognizing only certain individuals as full members. Territorial sovereignty and democratic voice have never matched completely. Yet presence within a circumscribed territory, and in particular continuing residence within it, brings one under the authority of the sovereign – whether democratic or not*"[547].

This is a crucial aspect. In a democratic society there must be a coincidence between the *demos* and the political community. A society cannot be deemed democratic if part of the *demos* is excluded from political rights and political participation.

That is what happened in ancient Greece with women and foreigners (metics) as described in chapter 1. That is why I referred to democracy in ancient Greece in cautious terms. By modern Western standards, it would not be considered a democracy without women's participation or a general exclusion of foreigners.

The exact same discussion took place in the US about Civil Rights and racial discrimination. Full

[547] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 19-20.

democracy was only obtained when women and African Americans were allowed to vote[548].

No matter how distant these realities may seem, a permanent exclusion of migrants from political rights will place them in the same situation as all of the above discriminated classes that international law and modern constitutions actively contradicted.

The argument has a strong moral and ethical claim. As Linda Bosniak phrases it when theorizing about ethical territoriality, "*it is both anti-democratic and morally wrong in liberal terms to allow for treatment of a class of persons who are living among us as social and political outsiders*"[549].

It is rooted in the thinking of Michael Walzer who, in his book *Spheres of Justice*, convincingly argues that "*the relevant principle here is not mutual aid but political justice. The guests don´t need citizenship – at least not in the same sense in what they might be said to need their jobs. Nor are they injured, helpless, destitute, they are able-bodied and earning money. Nor are they standing, even figuratively, by the side of the road, they are living among the citizens. They do socially necessary work, and they are deeply enmeshed in the legal system of the country to which they have come. Participants in economy and law, they ought to be able to regard themselves as potential or future participants in polities as well. (...) They must be set on the road to citizenship*"[550]. Walzer, as I mentioned

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[548] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 46.

[549] LINDA BOSNIAK, Being Here: Ethical Territoriality and the Rights of Immigrants (2007), 389.

[550] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism end equality* (1983), 59-60.

above, compares a community without naturalization to a tyranny.

A nation without a path to citizenship, with unclear or bureaucratic naturalization procedures that take significant time or exclude part of the population – like the undocumented migrants – is setting part of the *demos* aside from the polity. This can be compared to undemocratic societies or times when parts of the population where excluded from the democratic process. Certainly, these societies cannot be called or cannot call themselves democracies.

One of the major issues when discussing the paradox of democratic legitimacy is the last word: legitimacy.

In a democratic society, the legitimacy of the government and the laws is drawn from the people. The constitution of the US begins with the expression "We the people". Many social and political convulsions started with issues of political representation and legitimacy: "no taxation without representation".

As Seyla Benhabib correctly asserts, "*the democratic sovereign draws its legitimacy not merely from its act of constitution but, equally significantly, from the conformity of this act to universal principles of human rights that are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself. "We, the people," refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy*"[551].

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[551] LINDA BOSNIAK, Being Here: Ethical Territoriality and the Rights of Immigrants (2007), 44.

And she adds in another eloquent passage: "*Yet this paradox of democratic legitimacy has a corollary which has been little noted: every act of self-legislation is also an act of self-constitution. "We, the people," who agree to bind ourselves by these laws, are also defining ourselves as a "we" in the very act of self-legislation*"[552].

Jürgen Habermas also wrote on citizenship and legitimacy. According to him, "*with the institution of egalitarian citizenship, the nation state not only provided democratic legitimation but created, through widespread political participation, a new level of social integration as well. In order to fulfill this negative function, democratic citizenship must, however, be more than just a legal status; it must become the focus of a shares political culture*" [553].

The legitimacy problem can be condensed in this passage from Benhabib: "*be not only the subject but the author of the law*"[554].

In fact, migrant residents are permanently exposed and subjected to the laws of the country where they reside. They are members of the community; pay taxes, and participate in the economy. For that matter, they are permanent members of the community.

In that sense, we can have a group of people that is permanently subjected to the laws of a given country but has no say in its design. This is the paradox of democratic legitimacy.

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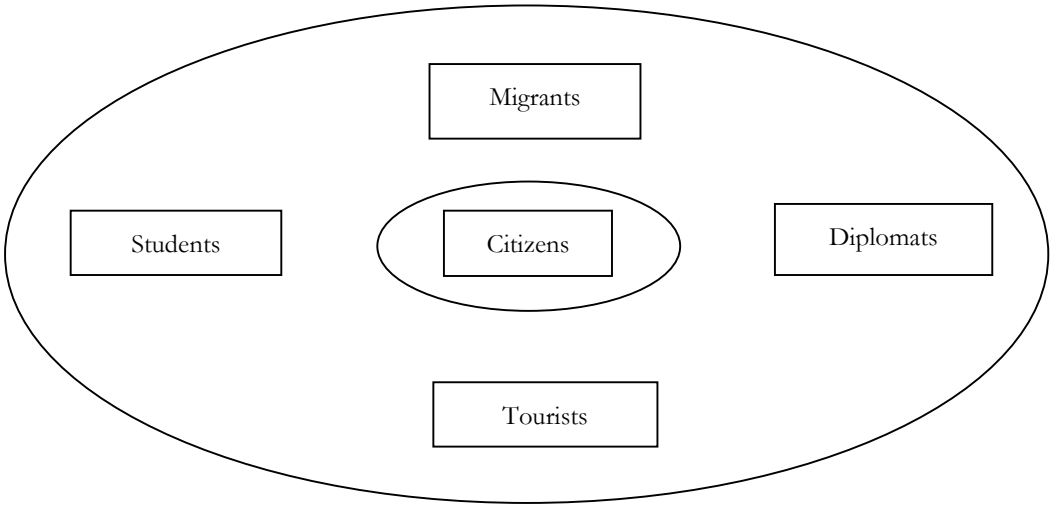
[552] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 45.

[553] JÜRGEN HABERMAS, The European Nation State – Its Achievements and Its Limitations – On the Past and Future of Sovereignty and Citizenship (1997), 117.

[554] SEYLA BENHABIB, *The Rights of Others, Aliens, Residents and Citizens* (2004), 181.

If we think of all the people that occupy a territory at a given time, we will find all sorts of classes:




It is certainly true that they are all subject to the laws of the country, but in different ways.

Citizenship and political rights are reserved to those in the center. I am not advocating that legitimacy depends upon the exercise of political rights by all these classes of people. Yet it is certainly true that if the group in the center utilizes its power to exclude all the others from political participation and does so in a permanent fashion, at least, that society is not democratic.

In the words of Michael Walzer, it would be like a club whose members use their power to perpetuate their influence by excluding others from accessing it[555].

This does not mean a theory of open borders. As Walzer also recognizes, countries have a right to control their borders and to establish an immigration policy.

It means that a human being that is a permanent resident in a State should not be permanently excluded from political participation in that State. And if that situation eventually occurs it will cause a legitimacy crisis in that State. Its laws will be illegitimate and undemocratic because they were drafted – directly or via representative democracy – not by all the members of the polity but by a group that expressly excludes part of the population.

Here we need to deal with the concept of people and population. They do not necessarily coincide.

Usually the concept of people is considered to be a legal one, defined by the internal citizenship laws. In a way, a law on citizenship is the internal instrument to design the people.

As I have described in previous chapters, especially in chapters 2 and 5, international law largely defers this competence to the national legislator. However, this certainly cannot be arbitrary. Any discrimination on the basis of race, gender, national origin, etc, would constitute a direct violation of the equality principle in international law. The establishment of limitation on this domestic sovereign

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[555] MICHAEL WALZER, *Spheres of Justice. A defense of pluralism end equality* (1983), 40.

power is a matter of no controversy these days in international law[556].

What I want to argue here is that because of the democratic principle there are additional limitations besides those mentioned suspect categories.

The question that should be asked is: what should the people be? Who should integrate the *demos*?

Going back to the figure, I do not think that all the categories mentioned should automatically integrate the people. They are not part of the *demos*.

International law may provide some help here. These categories can be found in the definition of migrants and its exclusions in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[557].

Tourists and students are certainly a group of people that only have contact with the laws of the country for a limited period of time. It is not disputed that they are subject to the laws of the country they visit, but it is not for a sufficient period of time to justify their participation in the internal polity. There is an additional argument to exclude tourists. In the majority of cases, their visit is optional and therefore their subjection to the law of the country is purely voluntary. A tourist can even refuse to visit a country because he is not willing to respect its laws. Of course it can be said that a migrant´s presence in a given country is also voluntary and that when the situation changes they are always free to leave. That is certainly true, at least in liberal democracies that do not control exit movements of people, but one cannot compare the level of attachment of a tourist to that of a resident

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[556] See supra chapter 2.

[557] I analyze this definition and criticize its exclusion on chapter 5.

migrant. The damages and losses of such a situation are incommensurate. Life has been settled in that country. For that matter, the resident migrant is much closer to the situation of the citizen who, if not satisfied with the polity, can always leave. And no one would dare to make such a proposition in a democratic and liberal society to justify the limitation on citizen's political rights.

Diplomats, even those who may reside in the country for a longer period of time are not only representing a foreign political community but are also protected by international regulations. In that sense, although subject to a significant number of laws of the country, they are exempted from many which means that there is no reason for them to integrate the *demos*.

Refugees are, of course, a different category and that is why it is not represented in the figure. Although they are protected by international law, once admitted they are fully subject to the laws of the country. In that sense they become members of the demos. Their protection under international law eases the legal situation in the country of refuge. First, the UN 1951 Convention Relating to the Status of Refugees, provides, in Article 33, for a general principle of prohibition of expulsion or return, also known as non-refoulement. Then, the Convention, in Article 34 establishes a duty on States to naturalize refugees: "*the Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings*"[558]. This is a clear example of an international law

[558] On chapter 2 I analyze this provision of the Convention.

instrument that imposes obligations on states regarding naturalization.

In any event, it is not only refugees that are specifically protected under international law, but their situation, once regularized under the standard asylum seeking procedure provided in the convention, ought to be considered as that of documented aliens and provide access to the citizenship path in any liberal democracy.

Migrants, especially the undocumented, are in a trickier situation. After a certain period of time – for this matter I will use the argumentation of §4 – they are permanent residents and members of the *demos*. That is the case regardless of their status. Although permanently subject to the laws of the country, they may well be in a situation in which they are also permanently excluded from political participation.

Then, a part of the actual *demos* is permanently excluded from political participation in their community. It is a clear situation where a paradox of democratic legitimacy occurs.

As Joseph Weiler clearly states, "*Citizens constitute the demos of the polity – citizenship is frequently, though not necessarily, conflated with nationality. This, then, is the other, collective side, of the citizenship coin. Demos provides another way of expressing the link between citizenship and democracy. Democracy does not exist in a vacuum. It is premised on the existence of a polity with members – the demos – by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos. Simply put, if there is no demos, there can be no democracy*"[559].

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[559] J. H. H. WEILER, *The Constitution of Europe. "Do the new clothes have an Emperor?" And other essays on European integration* (1999), 337.

This means that from a democratic and legitimacy standpoint it is absolutely necessary for a State that cherishes these values to establish a citizenship path through transparent and expeditious naturalization procedures to grant citizenship to all the permanent residents of the territory, namely documented and undocumented migrants.

Only such a path may open the way to an indispensable coincidence between the demos and the legal definition of the people. When these two concepts fail to coincide, the country can no longer be considered democratic.

No matter how strong and definitive this claim may sound, this line of argumentation is just another piece in the big puzzle I am trying to build in order to, as solidly as possible, identify a trend towards a fundamental right to citizenship.

In that sense, a possible criticism of the arguments related to the paradox of democratic legitimacy have to do with the nature of the democratic principle in international law.

Unlike other principles that I have used here, such as protection of expectations, proportionality, equality or legal certainty, the democratic principle can hardly be sustained to be part of the general principles of international law.

In any event, there is a growing importance of the democratic principle in international law.

Steven Wheatley wrote a notable article on the democratic rule in international law[560]. His angle was on the democratic deficit of international institutions and legislative bodies. This deficit is well known at the

[560] STEVEN WHEATLEY, A Democratic Rule of International Law (2011), 525-548.

level of the European Union, as I discussed in chapter 4.

In this article, Wheatley asserts that international institutions ought to incorporate democracy in order to legitimize their action. This can be done either by internalizing democracy in every international actor or by creating a world democratic super state.

Habermas also cherishes this vision. He says that "*the democratic legitimacy of the compromises negotiated here would rest on two pillars. As in the case of international treaties, it would depend, on the one hand, on the legitimacy of the negotiating partners. The delegating powers and regional regimes would have to take on a democratic character themselves. In view of the democratic deficit that exists even in the exemplary case of the European Union, this extension of the chain of legitimation of democratic procedures beyond national borders already represents an immensely demanding requirement*" [561].

In a way, while the democratic principle cannot be expressly deemed as a principle of *ius cogens*, it is certainly making its way in international law. Since there is a democratic claim in the governance and decisions of the international bodies and if these bodies are composed of representatives of the countries, it is highly predictable that the principle will contaminate the whole international community.

The democratic principle is also rooted in the practice of international law. It has provided justification for some of the most well-known military interventions in the international arena, with or without a mandate from the UN Security Council.

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[561] JÜRGEN HABERMAS, The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society (2008), 447; Id., *The Divided West* (2006).

As I affirmed in the introduction, my standpoint is not exclusively international law as we classically know it. I wish to draw moral and ethical arguments as well as legal ones, in a transnational perspective.

In that sense, whenever public transnational law is applicable I am willing to recognize it and accept it with all its binding legal international consequences.

Yet even when the international law case is doubtful, I think it is relevant to recognize an international practice that may not constitute international customary law but certainly embodies what is now called transnational law.

As I have underlined in the introduction – and this case suits well the argumentation about the democratic principle – it is sometimes more relevant to find a trend or even a norm that is forming in the transnational or global arena, than to assert the existence of a solid international law norm that is then disputed by the international community.

That is intuitively the case of the democratic principle. Even though it might be controversial to award it the statute of a general principle of international law, it is undisputable that it has been key in the resolution of many international conflicts and is rooted in the transnational discourse.

Apart from the transnational dimension, it is also important to consider the democratic principle even from a national standpoint. As I have underlined above, a country that fails in this principle by lacking legitimacy in its laws because of the deficient naturalization process and divergent concepts of *demos* and people, cannot call itself a democracy.

Again, my sole purpose is to identify this line of argumentation that, combined with the other arguments, allows for the recognition of a trend towards the

existence of a fundamental right to the citizenship of the State of residence.

## §6. Prospective

Citizenship is undergoing great development these days. As I have shown, scholars and transnational courts are devoting a lot of attention to it.

Although there is no consensual approach, developments clearly show a trend towards increasing interactions and limitations on national citizenship from international and transnational law.

This happens not only via the traditional international law instruments but also through the adoption of practices that increasingly constitute international practice.

A first response from scholars, as I explained in chapter 3, was the diffusion and transnationalization of citizenship elements. Even its devaluation was considered. In a way, this is recognition of the inevitable international fashion of citizenship and the response to that, trying to protect its core values or, at least, its status.

I do not believe in slicing citizenship. It is still an important status with legal, moral and ethical implications[562]. Data shows that it is valued as such[563]. Studies and surveys show that migrants still search for citizenship for inclusion and it is a powerful inclusive tool.

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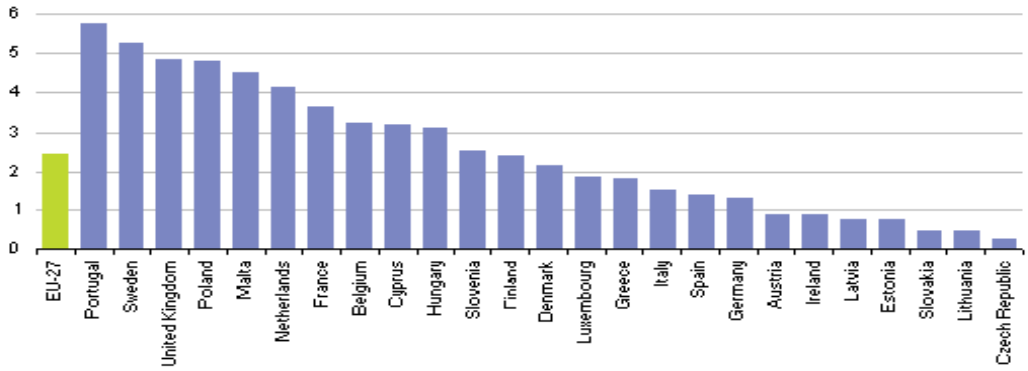
[562] MARC MORJÉ HOWARD, *The Politics of Citizenship in Europe* (2009), 7.

[563] *EWSI Special Feature 2013/03: Access to Nationality for Third-country Nationals,* available at http://www.migpolgroup.com/public/docs/EWSI_SF-2012%2003_Access-to-nationality_FIN.pdf.

According to the Eurostat, "*the number of people acquiring the citizenship of an EU Member State was 776 000 in 2009, corresponding to an 11.1 % increase with respect to 2008. The main contribution to this increase came from the United Kingdom, where acquisitions rose from 129 000 in 2008 to 204 000 in 2009; this was largely due to a relatively low number of acquisitions in the United Kingdom in 2008, which was a consequence of changes in staff allocation within the responsible national authority. Several other EU Member States recorded an increase in the number of acquisitions of citizenship between 2008 and 2009. In absolute terms, the highest increases, after the United Kingdom, were observed in Italy (5 700 more), Romania (3 800), Portugal (3 200) and Luxembourg (2 800). In some cases (such as Luxembourg, Portugal and Romania) these increases are due to recent reforms of the respective nationality laws, which had the effect of boosting the number of applications. Relative to the size of the resident population, Luxembourg granted the highest number of citizenships: 8.1 per 1 000 inhabitants, followed by Cyprus (5.1), the United Kingdom (3.3) and Sweden (3.2). One indicator which is commonly used to measure the effect of national policies concerning citizenship is the 'naturalisation rate', in other words, the ratio between the total number of citizenships granted and the stock of foreign residents in each country at the beginning of the year. The country with the highest naturalisation rate in the EU-27 in 2009 was Portugal (5.8 acquisitions per 100 foreign residents), followed by Sweden (5.3) and the United Kingdom (4.8). On the other hand, Luxembourg, due to its large share of foreign residents (43.0 % on 1 January 2010) had a naturalisation rate below the EU-27 average, despite being the EU Member State with the highest number of citizenship acquisitions per inhabitant. More than 90 % of those who acquired the*

*citizenship of an EU Member State in 2009 were previously citizens of a non-member country; this was the case in nearly all of the Member States. However, in Luxembourg and Hungary the majority of new citizenships granted were to citizens of another EU Member State. In the case of Luxembourg, the largest share (almost half of those from EU Member States that were granted citizenship) was that of Portuguese citizens, while in the case of Hungary almost exclusively that of Romanian citizens. As in previous years, the highest number of new citizens in the EU Member States in 2009 was composed of citizens of Morocco (59 700, corresponding to 8 % of all citizenships granted) and Turkey (51 800, or 7 %). Compared with 2008, the number of citizens from Morocco acquiring citizenship of an EU Member State fell by 6 %, while the number of Turkish citizens rose by 5 %. The largest share of Moroccans acquired their new citizenship in France (43 %), Italy (15 %) or Spain (11 %), while the largest shares of Turkish people acquired their new citizenship in Germany (48 %) or France (18 %)*".

The figure from Eurostat (source Eurostat, migration and migrant population statistics) is illustrative:




(1) Number of inhabitans refers to 1 January 2010; Bulgaria and Romania, not available, as foreign population stocks are not fully comparable.
Source: Eurostat (online data codes: migr_acq and migr_pop1ctz)

The OECD International Migration Outlook 2012 also shows a steady increase of naturalization rates at the level of the member states. The survey not only includes EU member states but also the United States, Russia, Korea, Japan, Mexico, South Africa, Turkey, Switzerland, Norway, New Zealand, Chile, Canada and Australia. This survey shows the naturalization rate evolution by country from 2000 to 2010. Not all the countries show an increase in the naturalization rate but the general trend is clearly towards a steady increase in the numbers[564].

So contrary to the beliefs of the theorists of citizenship devaluation, reality shows that citizenship is still a desired status and migrants see in it their way into full integration and political participation in the host country.

The US and EU provide most of the examples and data that I use in my argument. This is just because the immigration flow is stronger to these areas of the world. The US is still the country with the largest migration stock[565]. Estimates show around 12 million undocumented migrants living in the US. This poses major challenges for the immigration law and is an invaluable laboratory for those studying the effects of migration on citizenship.

The EU is also a very important laboratory. Being a space of integration and freedom of movement and establishment it is still not a federal State, which poses all sorts of interesting questions that I discussed in chapter 4. The creation of European citizenship, which I

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[564] *OECD International Migration Outlook 2012*, Statistical Annex, Acquisition of nationality available at: http://www.oecd.org/els/internationalmigrationpoliciesanddata/keystatisticsonmigrationinoecdcountries.htm.

[565] OECD International Migration Outlook 2012, Statistical Annex.

call the only example of an institutional transnational citizenship, is also a challenge to the relations between international, transnational and national citizenship law.

Some of the examples and court decisions that I use originated in the EU courts and practice. This is not a coincidence: citizenship is undergoing great development in the EU because of these complex relationships. However, it is also undeniable that principles and practices followed at the EU level will contaminate the rest of the world regarding citizenship and countries' limitations and obligations.

The mere claim or identification of trend towards a right to a specific citizenship is already revolutionary in nature. Even if everyone agrees that in liberal democracies the existence of a naturalization path is a given fact, the idea of spelling it out as a right that overrides national sovereignty over citizenship is far from being consensual. The claim is also useful for other countries that might not possess a transparent naturalization path or a path at all.

I understand that the most controversial claim I make is related to the undocumented migrants. This is a source of great controversy in every country that deals with this phenomenon.

What I came to find while writing this dissertation was that no moral, ethical or legal reason allows us to differentiate between documented and undocumented migrants regarding the right to citizenship.

Put like this, the last affirmation might sound outrageous. A clear argument pops up in the reader´s mind: undocumented migrants consciously breach the host country's immigration laws.

It is certainly true. Yet, as I have discussed, the source of a right to a specific citizenship is not compliance with the countries' citizenship laws or the

reward of the host country to the well behaved migrants that complied with the applicable regulations.

The sources of this right are the legal principles – both of international and transnational law – that are applicable to all human beings, regardless of their legal status.

Although there are valid, understandable and, sometimes, even compelling arguments against a naturalization path for undocumented migrants, if we think and accept the premises that I present and deal with the said right in the context of these principles, one cannot differentiate and needs to accept that documented and undocumented migrants are in the same situation as far as these principles are concerned.

I do not wish to make an exaggerated claim. I recognize that political rights are usually not included in the core universal human rights. Thus extending citizenship to this group of rights is not obvious or consensual.

My sole purpose was, through research into the most recent and up-to-date scholarly opinions and court case decisions, to identify a trend.

This trend is not defined by a single argument or line of thought. Rather on the contrary, it takes a complex set of arguments and signs to identify this trend.

Needless to say, I expect great developments in international and transnational citizenship law in the near future.

I anticipate, for the reasons I have explained above, that most of these developments will come from the European Union.

The reason for this anticipation is evident.

Firstly, increasing interactions between national and EU citizenship law will produce the necessary material for this study. The intense activity of the ECJ

in recent months on matters of citizenship allows a fairly solid prediction that more news is in the pipeline.

Then, the EU has the institutional basis that international law lacks to resolve citizenship issues, especially those which arise between individuals and the State. A landmark case in international law like Nottebohm is not likely to happen often given the special nature of international law jurisdiction. On the other hand, the EU judicial system provides the tools for individuals to bring such cases to justice. An increment in litigation related to citizenship will also bring more cases as people believe it is worth bringing such cases to the attention of the court.

Finally, an expected deepening of EU integration, especially in the political field, will bring citizenship to the center of the discussion and developments are expected as well.

The only risk to this theory that this integration may pose is that the EU may become closer to a federal sate and reduce its impact on the international law of citizenship.

However, as I have also stated above, that will not happen before a substantial contamination of the international arena regarding the fundamental principles of citizenship law.

One may also ask how will that trend be implemented and with what mandatory force?

This is not a mere rhetorical question; it is a substantial one. It is not my intention here to discuss the classical question of coercion in international law. It is way beyond the scope of this dissertation.

I will also not discuss, for it is also beyond the scope, the jurisdictional system in international law.

However, it is still worth mentioning, in prospective terms, how I anticipate the trend will be implemented in the national legal orders.

An obvious and ongoing process is what can be called "de facto harmonization".

The States will not expressly admit that they have harmonized their citizenship laws with other states but it will happen *de facto*.

Evidence of this harmonization can be found in the worldwide naturalization patterns, incorporation of *ius domicilii* as the main naturalization criterion, the uniform time frame for naturalization that I have identified in this chapter and the generalized trend towards relaxing naturalization procedures and times.

A very clear example of "de facto" naturalization occurred in Ireland after the Chen case[566].

As John Handoll describes, "*it also became relevant that, in May 2004, Advocate General Tizzano had delivered his Opinion in the Chen case, concluding that a child of non-national parents born in Northern Ireland and hence entitled to Irish citizenship and enjoying, through her parents, sufficient resources to ensure that she would not become a burden on the finances of the host state, was entitled as a matter of Community law to reside in Northern Ireland. (...) It was, to say the least, potentially embarrassing to the Irish government to retain a citizenship regime, with such Community law consequences in another Member State, especially where the right to the company of a parent had been rejected in Irish law. (...) In June 2004, the Bill was passed by the people in a referendum. The Twenty-Seventh Amendment of the Constitution Act 2004 and the amendments thereby made to art. 9 of the Constitution represented for the persons concerned a return to the status quo ante the 1998 constitutional amendment reflecting the British-*

[566] See chapter 4.

*Irish Agreement. Any entitlement to citizenship for these persons again became dependent on legislation, rather than constitutional prescription*"[567].

Also on the change of the Irish citizenship law, Howard says that "*nonetheless, in the years following the Good Friday agreement, there was a growing awareness – or at least perception – of the "unintended consequences" of the extremely liberal jus soli rule. Apparently, growing numbers of pregnant undocumented immigrants (the most prominent examples were from Nigeria) were arriving in Ireland for the purpose of giving birth to a baby who would receive Irish citizenship, and thereby extend residence rights to the mother (as caretaker) as well. Although Handoll refers to this scenario as "something of a caricature," it fueled a public "acrimonious debate" about what some called "citizen tourism"*[568].

Although the Chen case is not a naturalization situation, it is nevertheless a clear example of a "de facto" harmonization where a country, by a people´s referendum, decided to change the citizenship law due to the fear of the consequences of its interaction with other citizenship laws in the EU context. That example, the ECJ decision and the fear of Ireland being used as a hub for giving birth to children in order to acquire EU citizenship clearly influenced the popular decision to amend the Constitution.

This is not to say that Irish sovereignty was diminished but one must recognize the effects of the decision on the Irish citizenship law.

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[567] JOHN HANDOLL, Country Report: Ireland (2012), 9.

[568] MARC MORJÉ HOWARD, *The Politics of Citizenship in Europe* (2009), 163.

International courts may also apply this trend based on the general principles that I identified[569].

This was the case of the ECJ in the cases described in chapter 4, especially in Rottman, with a specific reference to the principle of proportionality. It is true that in none of these cases did the court force a State to confer its citizenship on a migrant. Yet the speed and intensity of the changes in case law in Europe allows us to anticipate that such a decision may occur in the near future.

The same will probably happen at the level of general international courts. Although their jurisdiction is limited, as I underlined above, the growing conclusion of international treaties with implications on citizenship law, as well as the development of generally applicable principles may also give rise to such decisions. The *jus domicilii* or, in Shachar´s formulation, *jus nexi* theory, may lead an international court to revisit the Nottebohm decision in such a way that the effective link means not only a negative limitation on States' sovereignty over citizenship but also a positive one, conferring a fundamental right to citizenship when a resident migrant shows an effective link with the territory of the said state.

As Habermas theorizes, I do not expect a world state or authority or legislator to be able to regulate citizenship any time soon[570]. In any event, even from a classic international law standpoint, it is not revolutionary to conceive the application of general

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[569] H. F. VAN PANHUYS, *The Rôle of Nationality in the International Law – An Outline* (1959), 178.

[570] JÜRGEN HABERMAS, The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society (2008), 447; Id., *The Divided West* (2006).

principles whose reading is revised under a consensual approach according to the natural evolution of the society. As I said in previous chapters, traditional conceptions on citizenship must be reviewed after the tremendous changes that transnational migration has forced on citizenship.

Finally, probably more in line with the current stage of international law and of transnational law, the activity of national courts cannot be disregarded.

It is not my purpose here – it is beyond the scope of this thesis – to discuss Anne-Marie Slaughter´s theory as to whether international law should be applied by international courts or domestic courts[571].

I just wish to recognize two facts.

In liberal democracies, the principles and practices that I identified and that support the trend I described are enshrined in most of the constitutions. For that reason an application of these principles by national courts is not unthinkable. That would mean that these courts might strike down national citizenship laws based on the unconstitutionality under the said principles.

Another possibility would be to acknowledge the application of international law by national courts – as they should do, at least in all the monist regimes – leading to the same result mentioned, this time based on the breach of international law[572].

Finally, some of these principles may well be considered mandatory international law – or *ius cogens*

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[571] ANNE-MARIE SLAUGHTER, Global Community of Courts (1999-2000), 1103.

[572] H. F. VAN PANHUYS, *The Rôle of Nationality in the International Law – An Outline* (1959), 178.

–, which would legitimize the intervention of national courts, even in dualistic systems.

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## ABSTRACT

There is a growing tendency towards the devaluation of the concept of citizenship. It was perceived for many years as a key instrument of internal sovereignty. Once States become transparent as a consequence of globalization and global governance, internal instruments of sovereignty become less powerful.

This is particularly evident in the tendency which may be identified in both scholarly works and in State practice towards extending broader legal rights to non-citizens.

There is room, however, for a different proposal for reassessing citizenship and the interconnection of the concept both with the global arena and internal democratic policies.

Based on basic principles of transnational citizenship law, such as the principle of protection of legitimate expectations, the principle of proportionality, *ius domicilii* and adverse possessions, as well as the democratic principle and also based on the naturalization pattern around the world, it should be possible to determine that no citizen in waiting should be permanently excluded from citizenship. Although this proposition might sound quite consensual – especially within Western countries with standard naturalization policies – the basic essence of what has been said is very controversial. It not only imposes a positive duty overriding an important dimension of sovereignty – the symbolic definition of the people – but it also gives rise to a discussion about undocumented migration. The Western pattern on naturalization policies certainly does not include

undocumented migrants. However, the same considerations about the democratic principle apply to this category of migrants, most of whom stay for several years in a country with the tolerance of the host State, to say the least. The access of these migrants to citizenship is an active question in the US and is becoming one in Europe as well. There is no legal answer whatsoever, even though it is widely recognized that undocumented migrants have, as would seem obvious, human rights. Does that mean that they also hold the right to citizenship?

However, there is certainly a different position for the nation-state from Westphalia to the global world. A global world without a global state still needs traditional states to enforce its principles and rules. As I see it, States are obliged by the transnational law to enforce basic principles and rules through their traditional enforcement channels. It is very clear that international and transnational law will not be enforced otherwise.

This does not mean, though, that States remain free to do whatever they wish as long as this does not conflict with other States. Internal constraints increasingly result from international and transnational law, even in areas considered to be the realm of sovereignty, such as citizenship.

## RESUMO

A cidadania, considerada durante séculos um instrumento fundamental da expressão da soberania do Estado, tem sido política e conceptualmente desvalorizada nos últimos anos.

Tal resulta do processo de globalização e da perda de relevância dos mecanismos de afirmação da soberania na ordem interna e externa e tem como consequência, entre outras, a extensão de direitos aos estrangeiros.

Apesar de esta prática poder ser interpretada como uma forma de consagrar direitos políticos e de garantir a participação efetiva dos imigrantes, na comunidade, não corresponde à melhor forma de proceder à sua integração.

Têm sido desenvolvidas diversas teorias sobre a evolução do conceito de cidadania. Algumas delas defendem a desvalorização do conceito, outras reconhecem a pulverização dos seus elementos e outras, ainda, preconizam o seu desmembramento e a extensão dos seus elementos aos imigrantes. Estas teorias têm sido identificadas como *cidadania global* ou *transnacional*.

É, todavia, possível uma proposta diferente para a reavaliação da cidadania e para a interconexão com a ordem jurídica internacional e as comunidades políticas nacionais.

Com efeito, quando os imigrantes deixam o seu país de origem, para viver num outro país, tornam-se, nas palavras de Motomura, "cidadãos em espera". Isto significa que são criadas expectativas relativamente à aquisição da cidadania do país onde vivem e em que se integraram económica, social e politicamente.

Corresponderia a um paradoxo democrático afastar estas pessoas, de forma permanente, do estatuto de cidadania. A afirmação da irrelevância do conceito e a extensão de direitos políticos aos imigrantes não resolve tal paradoxo. Esta extensão nunca será plena e aos imigrantes faltará o elemento inclusivo do conceito de cidadania. Será sempre discriminatória a conceção segundo a qual, de acordo com determinada perceção da soberania, o membro do "clube" – nas palavras de Michael Walzer – possa excluir permanentemente os outros do exercício de direitos políticos.

Assim, é necessário reconhecer o poder da cidadania como instrumento de inclusão – e negar a teoria do declínio da cidadania – bem como reconhecer que a pulverização dos seus elementos e a sua concessão aos imigrantes não permitirá atingir aquele objetivo último, uma vez que o acesso ao estatuto lhes estará negado.

O estudo das políticas de naturalização, em diversos países, permite-nos identificar uma tendência no sentido da existência de um procedimento e critério comum em matéria de atribuição da cidadania aos imigrantes. Da mesma forma, é hoje possível identificar instrumentos de direito internacional – tal como a Convenção Europeia sobre a Nacionalidade – que impõem obrigações aos Estados na concessão da cidadania.

Em face desta realidade é hoje necessário reinterpretar os textos que estabelecem o direito à cidadania, como a Declaração Universal dos Direitos do Homem. Foram lidos, durante muito tempo, como instrumentos de prevenção da apatridia. No mesmo sentido, encontramos outros tratados e decisões de Tribunais internacionais. O direito à cidadania era concebido como um limite negativo à soberania dos Estados. Um Estado poderia recusar ou ultrapassar a

decisão de um outro Estado, de concessão da cidadania, se tal decisão fosse arbitrária (por ausência de efetividade) ou conduzisse à apatridia.

A releitura da Declaração é, pois, necessária. Num mundo globalizado onde até a cidadania – "último bastião da soberania" (Stephen Legomsky) – se tornou global, não é suficiente considerá-la como um limite negativo à soberania dos Estados. Será porventura necessário admitir a imposição positiva aos Estados. Tal significa que se considerarmos a cidadania como uma consequência natural de um caminho iniciado no momento em que o imigrante atravessou a fronteira de um Estado para aí residir, teremos de conceder que, provavelmente, o direito à cidadania, hoje, não é já o *direito a ter uma cidadania*, mas o direito de aceder a *uma cidadania determinada*.

Tendo por base princípios de direito transnacional da cidadania, tais como o princípio da proteção das legítimas expectativas, o princípio da proporcionalidade, o "ius domicilii" e a usucapião e o princípio democrático bem como, tendo em conta os critérios de naturalização em diversos países, é possível afirmar que nenhum "cidadão em espera" deveria ser permanentemente excluído do perímetro da cidadania.

Apesar de aparentemente consensual, sobretudo em países ocidentais com critérios razoáveis de naturalização, a afirmação geral deste direito é ainda muito controversa. Não só se reconhece a imposição de limites a uma dimensão muito importante da soberania – a definição simbólica de povo – como abre a porta à discussão sobre a imigração ilegal.

Os mencionados padrões e critérios de naturalização não se aplicam, contudo, à imigração ilegal. Na verdade, porém, as considerações a propósito dos princípios fundamentais e, em especial, do princípio democrático, devem aplicar-se a esta categoria de

imigrantes, cuja residência é estabelecida, em muitos casos, com a tolerância dos Estados de acolhimento. O acesso destes imigrantes à cidadania é uma questão candente nos Estados Unidos e está também a tornar-se relevante na Europa. A afirmação incontestável da titularidade de direitos humanos por estes imigrantes deve incluir também o direito à cidadania?

Não se procura uma resposta definitiva a esta questão, mas a investigação realizada e a argumentação expendida permitirá compreender o estado da arte na discussão desta matéria, bem como identificar uma tendência que se verifica, cada vez mais, em trabalhos académicos e decisões judiciais, qual seja a de reconhecer a existência de um direito a uma cidadania concreta.

Este trabalho não se debruça sobre uma jurisdição em particular. As referências ao Direito de alguns Estados e, mesmo, ao Direito europeu e internacional têm por objetivo a identificação de exemplos e explicações contextuais de um conceito mais vasto de cidadania. A abordagem é, assim, verdadeiramente, de Direito transnacional, entendido como o conjunto de regras e princípios que concorrem para determinada solução jurídica, independentemente do lugar ou jurisdição onde essa solução ocorre ou de onde é originária.

Esta dissertação aborda a evolução do conceito de cidadania, desde as variações semânticas até à evolução das civilizações clássicas, da Idade Média e da Revolução Francesa; centra-se na evolução do direito internacional da cidadania e no novo direito internacional da cidadania; estuda o conceito de cidadania transnacional e suas variações; analisa a cidadania europeia como o único exemplo institucional de cidadania transnacional; dedica atenção especial às relações entre a cidadania nacional e europeia; põe em

discussão as decisões judiciais recentes e muito relevantes dos Tribunais Europeus; lança um olhar especial para o conceito de migrantes como cidadãos em espera, estudando os direitos dos migrantes e o seu caminho para a cidadania.

Conclui-se, coligindo argumentos para a identificação de uma tendência no sentido de um direito geral a uma cidadania específica.